



FDA Enforcement and the Constitution: The Validity of FDA Seizures under the Due Process and Just Compensation Clauses

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**FDA Enforcement and the Constitution: The Validity
of FDA Seizures under the
Due Process and Just Compensation Clauses**

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In Fulfillment of the Written Work Requirement

Abstract

This paper explores the way in which enforcement actions by the Food and Drug Administration (FDA) interact with certain constitutional rights, and it queries whether the system does its most to protect those rights while preserving the public interest in safety. The paper is essentially an analysis of the intersection of section 304 of the Food Drug and Cosmetic Act, involving FDA seizures, with the due process and just compensation clauses of the Fifth Amendment to the U.S. Constitution. The due process section of the paper relies heavily on the Supreme Court's decision in *Ewing v. Mytinger & Casselberry*. The just compensation section provides a review of select takings cases, including in particular *Miller v. Horton* and *Jarboe-Lackey Feedlots, Inc. v. United States*. At the end of each of these sections is a thought section discussing whether the law should be changed. There is also a brief analysis of the relationship of seizure law to the Fourth Amendment. The paper's conclusion is that the current state of affairs is not a disaster but could be improved.

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The protection of the public from impure or dangerous food and medicines has long been a primary concern of federal and state law enforcement.¹Few would question the government's motives in ensuring the public's access to safe and untainted products through appropriate means such as the seizure power. Nevertheless, even where the overall scheme is well-meant, we must be vigilant. Zealous law enforcement can, if unchecked, lead to the infringement of personal rights.²In this paper, I will explore the way in which enforcement actions by the Food and Drug Administration interact with certain constitutional rights, and I will query whether the system does its most to protect those rights while preserving the public interest in safety.³

¹See, e.g., Peter Barton Hutt, *Government Regulation of the Integrity of the Food Supply*, 4 ANNUAL REVIEW OF NUTRITION 1 (1984) (discussing the historical background of food and drug law), as reprinted in PETER BARTON HUTT & RICHARD A. MERRILL, *FOOD AND DRUG LAW, CASES AND MATERIALS* 1-4 (2d ed. 1991).

²See, e.g., James A. Adams, *The Supreme Court's Improbable Justifications for Restrictions of Citizens' Fourth Amendment Privacy Expectations in Automobiles*, 47 DRAKE L. REV 833, 838 (1999) (criticizing the Supreme Court's emphasis on police and governmental efficiency rather than valid privacy expectations in the Fourth Amendment context). Adams notes: "Thus, we must care about the principles applied by the Supreme Court in assessing our right to be secure against the government because the drafters recognized that the danger to a free society begins with a misguided or, potentially, a malevolent government." *Id.*

³Disclaimer: because current law tends to immunize FDA action, I generally approach the subject from the perspective of the aggrieved individual property owner. I do recognize, however, that in many if not most cases, the property owner is in fact a large, faceless corporation, and that the FDA is not Big Brother but rather a crucial bulwark against would-be wrongdoers.

I. Introduction

Seizure under the Federal Food Drug and Cosmetic Act of 1938⁴ applies to all Food and Drug Administration (FDA) regulated commodities, including foods⁵, drugs⁶, cosmetics⁷, and medical devices.⁸ Prohibitions against adulteration and misbranding in the FD&C Act have been construed broadly. “If a drug is misbranded in any one respect, it is subject to condemnation under 21 U.S.C. § 334(a)(1).”⁹ An entire shipment may be seized, even where only a small part of the shipment is proved adulterated.¹⁰ Conversely, the government may seize less of the merchandise than its warrant specifies.¹¹ Section 304(b)¹² of the FD&C Act indicates that its seizure provision is meant to mirror the same procedure in admiralty (although it notes explicitly that parties may request jury trials).¹³ The Supreme Court has said in construing a similar provision

⁴21 U.S.C. § 301 *et seq.* [hereinafter FD&C Act]. Some cases below fall under the Act’s 1906 predecessor. I will only note this where it is relevant to the discussion, either because the 1938 Act is substantively different in a given instance or because the general case law has shifted after 1938.

⁵21 U.S.C. § 334(a)(1). *See, e.g.*, U.S. v. 302 Cases, 321 Cases, and 420 Cases, More or Less of Frozen Shrimp, Currently Located at Americold Corp., 25 F.Supp.2d 1352, 12 Fla. L. Weekly Fed. D 77 (M.D. Fla. 1998) (adulterated shrimp).

⁶21 U.S.C. § 334(a)(1). *See, e.g.*, U.S. v. Undetermined Quantities of Various Articles of Drug ... Equidantin Nitrofurantoin Suspension..., 675 F.2d 994 (8th Cir. 1982) (adulterated animal drug called “Equidantin”). Counterfeit drugs and items used to store or produce them may be seized under § 334(a)(2)(A) and (B).

⁷21 U.S.C. § 334(a)(1). *See, e.g.*, U. S. v. Roux Laboratories, Inc., 437 F.2d 209 (9th Cir. 1971) (material question of fact as to whether additives in “Roux Lash and Brow Tint” rendered it adulterated and hence subject to FDA seizure).

⁸21 U.S.C. § 334(a)(2)(D). *See, e.g.*, United States v. An Article of Device “Theramatic,” 715 F.2d 1339 (9th Cir. 1983) (diathermy machine). Formerly, devices were regulated, like food, drugs, and cosmetics, under § 334(a)(1), but the Act was amended in 1976. Pub.L. 94-295, § 3(c)(1), (2), (3) (1976).

⁹U. S. v. Article of Drug * * * (BIFLAV-C-2) * * *, 292 F.Supp. 346 (C.D. Cal. 1968) (drugs were misbranded within the meaning of 21 U.S.C. § 352(b)(1) and (2), because, among other things, the plastic packets, containing 28 tablets each, did not bear a label containing the information required by that section).

¹⁰*E.g.*, U.S. v. 935 Cases, More or Less, Each Containing 6 No. 10 Cans of Tomato Puree, 65 F.Supp. 503, 504 (N.D. Ohio 1946) (“If the samples are reasonably representative of the lot shipped – that is, taken at wide random from the entire shipment it is in my opinion sufficient to embrace the entire shipment in the condemnation.”).

¹¹*E.g.*, U. S. v. Sixty-Five Casks Liquid Extracts, 170 F. 449, 455 (N.D.W. Va. 1909) (“The warrant being for the whole shipment, the government, if it had the right of seizure at all, could take the whole or any part it could find in the original packages.”).

¹²21 U.S.C. § 334(b).

¹³The application of admiralty rules is particularly relevant to Fourth Amendment analysis. For these considerations, see part IV, *infra*.

of the 1906 Pure Food and Drug Act:

We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process in rem, then giving the case the character of a law action, with trial by jury if demanded, and with the review already obtaining in actions at law.¹⁴

After the property has been seized and the suit brought against the goods themselves, then, the case will be treated as a civil suit, and the government must prove its case by a preponderance of the evidence.¹⁵ It is self-evident that when the FDA through one of its agents or the U.S. Marshall seizes a product from a company, that company has been deprived in some way of its property. The question arises as to the constitutionality of such an action. Although many provisions of the Constitution are relevant to seizure law, this paper will focus on the Fifth Amendment, and in particular, on issues of due process and just compensation (also known as takings doctrine).¹⁶ I will look at case law involving the FDA as well as related state and federal agencies, insofar as any action undertaken by these bodies comes in conflict with the Fifth Amendment. To the extent that the Fourteenth Amendment due process clause is implicated, it will be referenced, as well as relevant state provisions. I will also touch on the Fourth Amendment as it relates to the warrant requirements for government agents intending to seize goods. The paper will begin with a focus on due process, as it brings up issues of fundamental fairness that will be important throughout the discussion.

¹⁵U.S. v. Food, 2998 Cases, 64 F.3d 984, 989 (5th Cir. 1995) (distinguishing between administrative hearings for seized imported goods under 21 U.S.C. § 381 and judicial hearings under § 334, and noting that the standard under the latter is “a preponderance of the evidence”).

¹⁶For related issues involving other parts of the Constitution such as the First Amendment and the Commerce Clause see, e.g., *Founding Church of Scientology of Washington, D.C. v. United States*, 409 F.2d 1146 (D.C. Cir. 1968) (in suit contesting FDA seizure of certain devices and accompanying literature from Church of Scientology, court determined that where church made prima facie showing of legitimacy of religion, its literature was protected by First Amendment from scrutiny of truth or falsity of its claims), and *U.S. v. Depilatron Epilator Model No. DP-206 Universal Technology, Inc., Woodbridge, Conn.*, 473 F.Supp. 913 (S.D. N.Y. 1979) (holding that where Congress had rational basis for finding nexus between intrastate sale and interstate commerce, regulation was constitutional). See generally Margaret Gilhooley, *Constitutionalizing Food and Drug Law*, 74 TULANE L. REV. 815 (2000). These topics are outside the scope of this paper.

II. The Seizure Power and Due Process

A. *Foundations*: Ewing v. Mytinger & Casselberry

In the first instance, one must ask whether the constitutionality of FDA seizures is an issue that *really* matters. After all, the number of FDA seizures has decreased drastically over the last sixty years.¹⁷ Seizures are generally not intended to destroy a company; more often than not, a seizure action will be confined to an “identifiable lot of product and does not involve, for example, a major processing problem which affects all the products produced at the facility.”¹⁸ Can we assume that, if seizures are so rare, the FDA must be acting only in the most egregious cases? Moreover, if only a handful of corporations face the possibility of seizure, need we concern ourselves with their fates?

To answer, we must begin with the premise that the Constitution does not deal with how many are aggrieved, but whether those who are have valid reason to be.¹⁹ Whether they have reason to be depends on the criteria one uses; one might rely on the agency’s intentions, but from a broad perspective it is difficult to tell from FDA statistics whether the agency had the right motives in a particular case. It is clear that seizure is a powerful device and one that can be used by the FDA to *threaten* corporations even where a seizure is not ultimately conducted.²⁰ Other forms of FDA enforcement may not be as effective without seizure looming in

¹⁷See, e.g., PETER BARTON HUTT & RICHARD A. MERRILL, FOOD AND DRUG LAW, CASES AND MATERIALS 1205 (2d ed. 1991). The authors list the following statistics in regard to FDA seizures: 1939 – 1,861 seizures; 1951 – 1, 341; 1963 – 1,049; 1976 – 317; 1989 – 144. Similarly, criminal prosecutions declines from 626 in 1939 to 16 in 1989. *Id.*

¹⁸David F. Weeda, *FDA Seizure and Injunction Actions: Judicial Means of Protecting the Public Health*, 35 FOOD DRUG COSMETIC L.J. 112, 118 (February 1980). Mr. Weeda explains that so-called “mass seizures,” operations that can essentially shut down a factory and have “a chilling effect on that firm’s current production,” do occur (usually for poor food storage conditions or deviations from good manufacturing practices), but much more infrequently than lot seizures. *Id.*

¹⁹See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65, 120 S.Ct. 1073, 1074-75 (2000) (holding that homeowner could assert equal protection claim as class of one).

²⁰See, e.g., Nancy L. Buc, Esq., *FDA Enforcement 1991: Some Questions*, 47 FOOD AND DRUG L.J. 149, 153-4 (1992)

the background. Seizure is, then, such a powerful device that it requires an examination as to its fairness, an inquiry into whether the FDA has too much discretion.

State and federal courts have sanctioned the use of seizure by government agents since 1906 (the date of the precursor to the FD&C Act) and earlier.²¹ Concerns surrounding the constitutionality of the device, however, have also long been extant.²² A seminal case that tackles due process issues is *Ewing v. Mytinger & Casselberry*,²³ which involved the FDA seizure of eleven lots of a dietary supplement called Nutrilite.²⁴ The corporation in this case, Mytinger & Casselberry, Inc., was accused of misbranding its product. The product itself was apparently harmless,²⁵ but the Court noted that it would not be the arbiter of what made Nutrilite worthy of seizure:

(questioning whether it is fair to use seizure as *in terrorem* means to compel acquiescence to FDA demands).

²¹ See, e.g., *U. S. v. Sixty-Five Casks Liquid Extracts*, 170 F. 449, 455 (N.D.W. Va. 1909); *North American Cold Storage Company v. City of Chicago*, 211 U.S. 306, 29 S.Ct. 101 (1908); *Munn v. Corbin*, 44 P. 783 (Colo.App. 1896).

²² See, e.g., *Armour Packing Co. v. Snyder*, 84 F. 136, 139 (D. Minn. 1897) (due process concerns regarding seizure under oleomargarine law of Minnesota).

²³ 339 U.S. 594, 70 S.Ct. 870 (1950). This paper will examine this case in depth with the general approach of ‘what does this case tell us about due process in relation to seizure law?’ With the exception of multiple seizures, this case was not the first to rule on the constitutionality of most of these questions, but it does shed light on many of them and is therefore a good case for discussion purposes. The litigation involving claimant’s due process rights was merely one part of a contentious battle regarding the Nutrilite product, which ended when the manufacturers agreed to a consent decree. See Lester L. Lev, *The Nutrilite Consent Decree*, 7 FOOD DRUG COSMETIC L.J. 56 (January 1952). Although outside the scope of this paper, 1952’s Food Drug Cosmetic Law Journal also contains pertinent discussions on the question of restitution from the producer to the consumers who were allegedly swindled in purchasing Nutrilite (a point upon which FDA did not prevail in the decree). See John Philip Noland, *Section 302(a) of the Federal Food, Drug, and Cosmetic Act: Restitution Reexamined*, 7 FOOD DRUG COSMETIC L.J. 373 (June 1952); Charles S. Rhyne, *Penalty Through Publicity: FDA’s Restitution Gambit*, 7 FOOD DRUG COSMETIC L.J. 666 (October 1952).

²⁴ A combination of “alfalfa, water cress, parsley and synthetic vitamins,” *Mytinger and Casselberry* at 595, the booklet that accompanied the supplement indicated its use for such diverse ailments as low blood pressure, high blood pressure, overweight, underweight, easily tired, gas in stomach, flabby hysterical tendency, eczema, lack of ambition, craving for sour foods, arthritis, deafness, and night blindness, among many others. *Id.* at 597 n.4.

²⁵ *Id.* at 595. Besides the Court acknowledging as much, the ingredients suggest this, as well.

[Congress] may conclude, as it did here, that public damage may result even from harmless articles if they are allowed to be sold as panaceas for man's ills. . . . For all we know the most damage may come from misleading or fraudulent labels. That is a decision for Congress, not us.²⁶

Although dicta, this is an important statement, as it emphasizes the Court's willingness to defer to Congressional judgment as to the justification behind property deprivations. A company may be deprived of its product even where harmless, *with apparently no determination by the Court as to the appropriateness of such an action.*

If the purpose of seizure is solely to protect the public, this seems a strange result. Governmental agents are accorded the power of seizure as part of their police powers to insure the health and safety of the public.²⁷ The Court, in forgoing the determination as to whether the alleged violation was a real danger to society, left itself open to Justice Jackson's criticism in his dissent that the FDA can use seizures "with a purpose to harass" the owner of the property, a statement the Court did not refute.²⁸ The FDA's actions, even if not malicious, can amount to harassment all the same.²⁹ This is especially true in light of the fact that in some instances courts will not let the FDA revoke its seizure of an item without a hearing, thus forcing

²⁷See, e.g., *North American Cold Storage Company v. City of Chicago*, 211 U.S. 306, 315, 29 S.Ct. 101, 104 (1908) ("The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it."). The *North American Cold Storage* Court, it should be noted, is also highly deferential to the legislature.

²⁸*Mytinger and Casselberry* at 604 (Jackson, J., dissenting). But see *Southeastern Minerals, Inc. v. Harris*, 622 F.2d 758, 764-65 (5th Cir. 1980) (holding that district court could not enjoin FDA from visiting and inspecting manufacturer's plants except insofar as such visits were harassing).

²⁹Nancy L. Buc tells the following anecdote:

In one situation the FDA sent a regulatory letter to a company, which answered almost immediately with a detailed response as to why its conduct was lawful. The company then heard nothing for about six months, whereupon it was reinspected and, very soon, had its goods detained by the FDA. The company asked for a hearing, as was its right, but on the morning of the day on which the detention hearing was scheduled for the afternoon, the FDA cancelled the detention hearing and seized the goods. . . . First, the agency seems to have assiduously denied itself the opportunity to consider the company's views, and to seek an agreement instead of litigation. Second, the feel of that sequence, especially cancelling [sic] the detention hearing, virtually invites confrontation. One can understand and agree with the need for the FDA to act decisively where there is a health or safety risk, but it is hard to see such a risk in a situation which the FDA did not deal with at all for six months, and even harder to see why there was not time to listen when the goods were already detained.

Buc, *supra* note 20, at 150-51.

the owner to bear the deprivation even where the administrative body responsible for the action no longer can justify it.³⁰ A second important attribute of this case is that the alleged mislabeling was in the form of a booklet that accompanied the product. Because the supplement was sold with the booklet, the FDA could seize *both* the booklet and the supplement, even though, as noted, the supplement itself was apparently innocuous.³¹ The picture that emerges is one of vast agency authority: the ability to seize a harmless product when an accompanying brochure makes apparently unjustified boasts about the product. In the due process context, this seems like broad discretion, indeed.

B. Notice and Hearing

Preliminaries aside, the crucial due process question in relation to seizure law is whether both notice to the potentially aggrieved party of the impending action and a hearing to determine whether the action will be justified are required before the FDA can act to seize someone's goods. *Mytinger and Casselberry* stands for the proposition that, under the Fifth Amendment, "no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective."³² In other words, an item may be seized and the legitimacy of the seizure determined later. In the Supreme Court's 1908 case *North American Cold Storage Company v. City of Chicago*,³³ it determined that it was

³⁰ See, e.g., U. S. v. 893 One-Gallon Cans, More or Less, etc., Labeled Brown's Inhalant, 45 F.Supp. 467, 470 (D. Del. 1942) (articles may not be released for storage on bond to claimant before judicial determination of misbranding issue); see also U. S. v. Alcon Laboratories, 636 F.2d 876, 883 (1981).

³¹ *Id.* at 596-8. See also U.S. v. 8 Cartons, Containing "Plantation 'The Original' etc., Molasses," 103 F.Supp. 626, 628 (W.D.N.Y. 1951) ("The seizure relates not to books offered for bona fide sale but to copies of the book claimed to be offending against the Act by being associated with the article 'Plantation' Blackstrap Molasses in a distribution plan in such a way as to misbrand the product.").

³² *Mytinger and Casselberry* at 598. See also, e.g., U.S. v. Undetermined Quantities of Clear Plastic Bags of an Article of Drug for Veterinary Use, 963 F.Supp. 641, 646 (S.D. Ohio 1997) (holding that it is not a violation of due process for the government to seize property under the FD&C Act without holding a prior hearing).

³³ 211 U.S. 306, 29 S.Ct. 101 (1908).

constitutional under the Fourteenth Amendment for the city of Chicago to seize *and destroy* food in cold storage without a preliminary hearing.³⁴ A post-seizure hearing as to the legitimacy of the action in that case seems to lack teeth, but it may be said to be better than nothing.

Whether notice and a preliminary hearing were required was not originally clear under the FD&C Act's 1906 precursor. Section (§) 10 of the 1906 Act regulated seizure actions but was silent on the subject. Section (§) 4 of the Act, however, stated that upon determining that a food or drug specimen was adulterated, the Secretary of Agriculture was required to give notice and the opportunity for a hearing to its owner.³⁵ Some courts, then, required notice and preliminary hearings in seizure actions, holding that § 4 was controlling.³⁶ Many other courts, however, construed § 4 as unrelated to § 10, which put responsibility for commencing a seizure action in the hands of the U.S. Attorney. These courts rejected the notice and hearing requirements.³⁷ The Supreme Court, per Justice Lamar, resolved the dispute in *U.S. v. Morgan*,³⁸ reversing the lower court in stating that a § 4 hearing is not a judicial determination and therefore has no relationship to the requirements

³⁴*Id.* at 314-16. It is crucial to the Court's decision that the owner of the property had some means of redress if the seizure was unfounded, i.e., through a civil action after the destruction of the goods. *Id.* There is some indication that the authority for such an action might be peculiar to nuisance law; *cf.* *Sings v. City of Joliet*, 86 N.E. 663 (Ill. 1908) (resting the power to destroy an infected building without hearing on the fact that the disease constituted a nuisance and an emergency). These aspects of seizure are explored in the takings section, *infra* part III and note 105.

³⁵Section 4 of the 1906 Act read as follows:

That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States District Attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the authority of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

Food and Drugs Act, § 4, 34 Stat. 769, 21 U.S.C. § 11 (1906).

³⁶*E.g.*, *U.S. v. Twenty Cases of Grape Juice*, 189 F. 331 (2d Cir.1911).

³⁷*E.g.*, *U S v. Nine Barrels of Olives*, 179 F. 983 (E.D. Pa. 1910) (notice and hearing not a condition precedent to the bringing of a suit by the United States for violations of Pure Food and Drug Act); *U.S. v. Seventy-Five Barrels of Vinegar*, 192 F. 350, 353 (N.D. Iowa 1911) (providing notice and hearing after seizure not a violation of due process).

³⁸222 U.S. 274, 280-1, 32 S.Ct. 81, 82 (1911).

of § 10. According to the Court, notice and the opportunity for a hearing were not required. The Court seemed to rest its decision entirely on statutory justifications. It did not address due process, but limited its constitutional inquiry to a remark about the Fourth Amendment: Justice Lamar notes briefly that the safeguard for an owner is not notice and a preliminary hearing, but the requirement of a determination of probable cause before a seizure can take place.³⁹ *Mytinger and Casselberry*, then, goes further than *U.S. v. Morgan* in that it does address the Constitutional issue.⁴⁰ Nevertheless, the *Mytinger and Casselberry* Court comes to the same conclusion that probable cause is a sufficient safeguard for an aggrieved owner.⁴¹ This probable cause determination, however, is not reviewable by a court, as it is “merely the statutory prerequisite to the bringing of a lawsuit.”⁴² That the FDA can seize someone’s property without a preliminary determination as to the legitimacy of such an action is a true boon: “[A] seizure eliminates presentation of a case before a judge until the FDA has already gotten much of what it wants. No matter how weak its case, the FDA ‘wins’ by seizing.”⁴³

C. Multiple Seizures

Mytinger and Casselberry also stands for the important proposition that multiple seizures may be carried out before a hearing takes place; a hearing is not required immediately after the first seizure as a sort of test case.⁴⁴ In other words, where a party has several lots of allegedly defective goods, even if spread out across

³⁹ *Id.* at 282.

⁴⁰ *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599, 70 S.Ct. 870, 873 (1950).

⁴¹ *Id.* at 598. Courts have sometimes been lax on the probable cause requirement, as well. *See*, part IV, *infra*.

⁴² *Id.*

⁴³ Buc, *supra* note 20, at 152 (arguing for increased use of injunctions instead of seizures).

⁴⁴ *Mytinger & Casselberry*, 339 U.S. at 601.

the country, the FDA can move to seize *all* the lots, with the hearing to determine whether such action was justified to follow. This can be crippling to a producer;⁴⁵ multiple seizures may be instituted for any alleged adulteration and in most circumstances for misbranding.⁴⁶ In a September, 1950, Food Drug Cosmetic Law Journal article, Lester L. Lev laments the ease with which the FDA can satisfy the Act's criteria for misbranded items. The FDA can institute multiple seizure actions merely if the Administrator or her agent believes that the labeling is misleading in a "material respect."⁴⁷ Lev describes this sort of discretion as "loaded with dynamite,"⁴⁸ and points out that "the question as to what is misleading is frequently a very close one involving sharp differences of honest opinion."⁴⁹ Indeed, the image of what FDA discretion means has now been enlarged. The FDA can essentially target the entire product line of a particular company based at best on probable cause, and it is only the discretion of the agency in the first instance, and the Attorney General in the second instance,⁵⁰ that determines whether the product will be held for hearing. This is so, even though "[t]he devastating effect on a small or medium-sized victim of a many-pronged seizure campaign cannot be overemphasized."⁵¹ Is it fair to leave the deprivation of someone's livelihood to the whim of an

⁴⁵The Court acknowledges as much: "It is said that these multiple seizure decisions of the Administrator can cause irreparable damage to a business. And so they can." *Id.* at 599.

⁴⁶Multiple libels for condemnation may be instituted for misbranding:

(A) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (B) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer.

21 U.S.C. § 334(a)(1).

⁴⁷*Id.*

⁴⁸Lester L. Lev, *The Multiple Seizure Bludgeon*, 5 FOOD DRUG COSMETIC L.J. 535, 537 (September 1950).

⁴⁹*Id.* at 539.

⁵⁰*Mytinger and Casselberry*, 339 U.S. at 599.

⁵¹Lev, *supra* note 48, at 537. Lev goes on:

A large number of seizure actions can effectively ruin the morale of the selling organization....The salesmen and store owners from whose stocks the seizures are made are certain to lose their ardor in pushing the product in the future....Adverse publicity, which frequently follows the filing of such law suits in the various jurisdictions where they are brought, forever damns the product in the public mind. The difficulty and expense of filing claims of ownership, answers, and bonds in widely separated

official? Consider the complaint by the property owners in *North American Cold Storage*, that decisions by the city boards of health determining the fitness of food were made by “men holding ephemeral positions in municipal bodies. . . frequently uneducated, and generally unfitted to discharge grave judicial functions.”⁵² Of course, one would tend to think much more highly of FDA officials and the Attorney General, but the general sentiment recognizing the fallibility of government agents working in a bureaucracy has bite.

The *Mytinger and Casselberry* Court responds to this sort of criticism by analogizing seizure to detention in the criminal law context:

Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. . . . As a result the defendant can be arrested and held for trial.⁵³

The Court makes a good point – if seizure of the person is acceptable, surely seizure of goods must be, as well. Grand juries are hardly very discriminating; the FDA probably rejects more potential cases than a typical grand jury.⁵⁴

On the other hand, maybe the problem is not fallibility at all, but rather prejudice. A grand jury is a body of assumedly unbiased citizens rather than an agency with an agenda. Hence, the grand jury gives the appearance of impartiality, something that was apparently lacking in *Mytinger and Casselberry*. The Court seems unconcerned: “Discretion of any official may be abused. Yet it is not a requirement of due process that

jurisdictions, and in arranging for consolidation and removal of the actions may be enormous, and, in some cases may be beyond the claimant’s financial ability to meet.

Id. See also *National Remedy Co. v. Hyde*, 50 F.2d 1066, 1067 (D.C. 1931) (“The prosecution of libels in various courts in widely separated parts of the United States is unnecessarily oppressive and causing appellant great and unnecessary expense, and is ruining, and will ruin and destroy, its business and good will.”). Note, however, that *National Remedy Co.*, under the 1906 Act, did not have access to the same consolidation procedures as those companies whose products are seized under the 1938 Act. *Cf.*, e.g., *Pharmadyne Laboratories, Inc. v. Kennedy*, 596 F.2d 568, 571 n.7 (3d Cir. 1979).

⁵²*North American Cold Storage Company v. City of Chicago*, 211 U.S. 306, 317, 29 S.Ct. 101, 105 (1908).

⁵⁴On the other hand, a proceeding under the FD&C Act is a civil action, so that although the *detention* of the item, like the detention of someone before criminal trial, may be based on probable cause, the item itself may be condemned by a preponderance of the evidence, unlike the criminal who must be guilty beyond a reasonable doubt.

there be judicial inquiry before discretion can be exercised.”⁵⁵ Still, the *Mytinger & Casselberry* Court said it would not consider the FDA’s intent. Worse yet for the claimant, if the FDA’s motivations are immaterial, so are those of its adversary. Courts have held that the innocent intentions of an owner are irrelevant.⁵⁶ What matters is that the property violates the FD&C Act. Courts have upheld seizure actions against due process claims even when the FDA had not published the regulations that made the product illegal until after the item was produced.⁵⁷ To be fair, the result in cases like *Mytinger & Casselberry* is hardly inconceivable. The public health may be at risk in a particular instance, and there may be no other way to safeguard the community apart from seizure. The *North American Cold Storage* Court notes, in light of the complainant’s arguments: “[T]he question arises what is to be done with the food in the meantime. Is it to remain with the cold storage company, and, if so, under what security that it will not be removed?”⁵⁸ This reflects a concern with food and other products under the jurisdiction of the FDA; it is difficult to ensure that a company will leave its potentially illegal product quarantined until further notice, especially when those products have a shelf life. Why give corporations an incentive to shred the evidence? The nature of FDA regulated products is that they are often times ingested, such that they present a great risk of harm to the consumer. Such products cannot safely be left on the market.⁵⁹ On the other hand, these products are the livelihood of a

⁵⁵ *Mytinger and Casselberry*, 339 U.S. at 599.

⁵⁶ *E.g.*, U.S. v. 75 Cases, More or Less, Each Containing 24 Jars of Peanut Butter, Labeled in Part (Jars): “Top Notch Brand,” 146 F.2d 124, 128 (4th Cir. 1944) (“Under the Act, condemned goods are subject to seizure and destruction irrespective of the intent of the manufacturer.”), *certiorari denied* 325 U.S. 856, 65 S.Ct. 1183.

⁵⁷ *See*, U.S. v. 900 Cases Peaches, 390 F.Supp. 1006, 1011 (E.D. N.Y. 1975) (denying claim although regulations regarding canned peaches were passed after peaches were canned). *But see* United States v. 484 Bags, More or Less, 423 F.2d 839, 842 (5th Cir. 1970) (noting that claim that coffee tolerances were not in effect before hearing was “not without equity,” but not reaching the issue).

⁵⁸ *North American Cold Storage Company v. City of Chicago*, 211 U.S. 306, 320, 29 S.Ct. 101, 106 (1908).

⁵⁹ In some cases, the concern that a producer of some good might try to purge her stock before the FDA can implement the seizure has moved the agency to request embargos, restraining orders, and injunctions against the commodity. Consider Marie A. Urban, *The FDA’s Policy on Seizures, Injunctions, Civil Fines, and Recalls*, 47 FOOD AND DRUG L.J. 411, 413 (1992):

“[I]f there is a concern that the product will be distributed before seizure can be effected, the agency will assess whether the dealer will voluntarily hold the product and, if not, will request a state embargo. In the Medical Device Amendments of 1976, there is a provision for administrative detention of devices intended for human use. This enforcement mechanism may be considered when, among other things, there is a likelihood that significant numbers of the devices will be moved before seizure

corporation, and may be expensive to produce, as well as perishable.

One must consider the requirements of the hearing in this context. A defendant is entitled to a hearing “at a meaningful time and in a meaningful manner.”⁶⁰In other words, due process puts up a roadblock to the FDA arbitrarily *delaying* a condemnation proceeding (even if the agency may arbitrarily seize the item in the first instance), although the exact parameters under which such a hearing must be conducted are not clear. In the *United States v. An Article of Device “Theramatic,”* the hearing was delayed several years, but that was in part due to the owners of the property seeking a settlement, and as such the court did not sympathize with their plight.⁶¹The court did not consider the failure of the rules to explicitly provide for a timely hearing to be problematic, since effectively the property owner could attain a relatively quick determination via several different methods (a motion to quash the warrant, a motion to dismiss the complaint, a motion for summary judgment, or the somewhat slower process of a full hearing on the merits of the seizure action).⁶²Nor was the court concerned by the fact that it was the owner of the device rather than the government that had the burden of requesting the hearing.⁶³

is effected or the FDA has reason to believe the devices are adulterated or misbranded.

Although an embargo, e.g., might also be constitutionally infirm, for the purposes of this paper it will not be addressed separately.

⁶⁰*United States v. An Article of Device “Theramatic,”* 715 F.2d 1339, 1342-43 (9th Cir. 1983) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965)).

⁶¹*Id.* at 1343.

⁶²*Id.*

⁶³*Id.* As authority for this proposition, the court points to the case of *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610, 94 S.Ct. 1895, 1901 (1974) (upholding as constitutional Louisiana procedures for sequestration of property by mortgage or lien holder, including fact that debtor would request hearing).

The end of all of this is that the due process clause is not the best source of rights for a property owner when the FDA believes that the her goods violate § 304 of the FD&C Act. Legitimate concerns for the public welfare stand in the claimant's way. The question remains, then, whether the power of the FDA is too broad, and whether in certain circumstances it infringes on the property rights of food, drug, cosmetic, and device manufacturers. Obviously, public safety is of utmost concern, even where the existence of a business is at stake. Should we consider, however, the type of harm that the public faces? Is economic harm a sufficient threat to the public to justify this type of deprivation? Should a more careful balance of the harms to the public versus the proprietor be made? In this next section, I will consider two approaches to certain aspects of the problem: Lester L. Lev's proposal regarding multiple seizures and a California court's approach to perishables. I will also suggest an analogy to criminal law that might have relevance in the food and drug context.

D. Proposed Solutions to Due Process Problems

There is not a wealth of existing material proposing changes to the current laws regarding seizure by the FDA. This probably has something to do with the perceived adequacy of the laws by the public and by lawyers and judges, but may also have something to do with reduced reliance by the FDA on this method of enforcement. Regardless, the Constitution cautions us to be cognizant of property deprivations, and we should not be resistant to efforts to tweak the law where doing so may have a beneficial effect.

One place to start is the issue of agency discretion. As an analogy, consider *Whren v. United States*,⁶⁴ in which

⁶⁴517 U.S. 806, 116 S.Ct. 1769 (1996).

the Supreme Court determined that pre-textual traffic stops were Constitutional. That case involved the Fourth Amendment, but the principle is relevant here – that with broad discretion, agents of the government will always be able to find *some* violation of the law:

For instance, any time officers see a driver suspected of criminal activity, the officers can stop that individual for a bad tail light, failure to signal a turn, no seat belt, following too closely, or one of my personal favorites riding your bicycle after dark without a light.⁶⁵

In the food and drug context, as in *Whren*, something seems amiss when the power of the government is expansive and the defined crime relatively minor – as may be the case in many instances of misbranding.⁶⁶ In light of the assumption in *Mytinger and Casselberry* that arbitrary seizures are permissible,⁶⁷ use of the seizure power or the *threat* of the seizure power could be abused.

Lester L. Lev, as noted earlier, criticizes the “danger inherent in the multiple seizure power.”⁶⁸ He points out that fear of such broad power delayed the passage of the 1938 Act.⁶⁹ He proposes three modifications to the law:

⁶⁶21 U.S.C. § 343. *See, e.g.*, *Libby, McNeill & Libby v. United States*, 148 F.2d 71, 72-73 (2d Cir. 1945) (holding that tomato catsup conforming to government standard except for addition of small quantity of sodium benzoate, a harmless preservative, purported to be tomato catsup notwithstanding fact that it was truthfully labeled as “tomato catsup with preservative,” and hence was misbranded and subject to condemnation); *U.S. v. 254 Cases and 499 Cases, Each Containing 48 Cans, of an Article Labeled, in part, “Net Contents 10 Oz. Avoir. Baby Brand Tomato Sauce,”* 63 F.Supp. 916 (E.D. Ark. 1945) (holding tomato sauce to be misbranded because it purported to be tomato sauce but was not spiced and contained only 6.5% instead of 8.37% salt-free tomato solids); *United States v. 20 Cases... ‘Buitoni 20% Protein Spaghetti,’* 130 F.Supp. 715 (D.Del.1954) (upholding the seizure of spaghetti containing 20% Protein as against a permitted maximum of 13%) *aff’d on the opinion below*, 228 F.2d 912 (3 Cir. 1956).

⁶⁷*See, e.g.*, *Pharmadyne Laboratories, Inc. v. Kennedy*, 596 F.2d 568, 571 & n.6 (3rd Cir. 1979).

⁶⁸Lev, *supra* note 48, at 538.

⁶⁹*Id.*

That the [FD&C] Act should be amended: (a) To confine the use of multiple seizures in misbranding cases to those instances in which the article is dangerous to the public health. (b) To give libel actions preference on the trial calendar. (c) To specifically authorize the transfer of libel actions, whether for adulteration or misbranding, to any district, including the claimant's home district.⁷⁰

To begin at the end, proposal (c) affects the ease with which one can defend a libel action.⁷¹ This proposal, though, may be a casualty of broad based business. Certainly a company that sells its wares all over the nation should be prepared to defend in those places, as well. Proposal (b), suggesting that libel actions receive preference on the trial calendar makes sense,⁷² but may be impractical. It is obviously important that the issues be resolved speedily, but whether the harm to an individual producer is any greater than, say, the harm to a criminal defendant awaiting trial, the harm to a child awaiting determination of his custody, the harm to a tenant awaiting determination of her eviction status, etc., is unclear. Courts deal with many important issues.

Proposal (a) essentially limits the FDA's multiple seizure power in borderline or 'iffy' cases – Lev wants to abandon the “misleading in a material respect” concept. It is unclear from the proposal whether Lev would also take away FDA authority in cases of fraudulent labeling. Fraud is a legitimate harm, but as he points, the *emergency* in fraud cases is “far less real” than in public health cases.⁷³

Consider *Libby, McNeill & Libby v. United States*.⁷⁴ It involved the seizure of ‘catsup’ that contained a

⁷¹As noted, due process requires a hearing “in a meaningful manner.” *United States v. An Article of Device “Theromatic,”* 715 F.2d 1339, 1342-43 (9th Cir. 1983) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965)).

⁷²As noted, due process requires a hearing “at a meaningful time.” *Id.*

⁷³Lev, *supra* note 48, at 537. In the balance, it seems that potentially fraudulent producers should not be able to reap the fruits of their actions, although this may just give companies an incentive to be negligent instead. There seems to be something worse about a producer intentionally calling colored water apple juice than a producer accidentally mislabeling her apple juice. This may be a difficult distinction, however. Unfortunately, the line between fraudulent misbranding and adulteration is also somewhat unclear. See Paula Kurtzweil, *Fake Food Fight*, U. S. Food and Drug Administration FDA Consumer (March – April, 1999) available at <http://www.cfsan.fda.gov/~dms/fdfake.html>.

⁷⁴148 F.2d 71 (2d Cir. 1945).

small quantity of sodium benzoate, a harmless preservative. The catsup was condemned because it did not satisfy the labeling standard for “tomato catsup” even though the addition of the preservative was its only deviation from the standard, and even though the label indicated that it was “tomato catsup with preservative.”⁷⁵ What if, in a case such as *Libby*, the FDA wanted to enact multiple seizures? Perhaps the company can prove that its product is within the statute; the harm to the public is minimal if the FDA is right, but the harm to the producer is serious if the agency is wrong. Would we be better off letting the public be ‘deceived’ for a short time, allowing the FDA to enjoin the company from making more of the product,⁷⁶ and holding a hearing on the first batch of catsup that is seized? One can assume under these facts that there is no health risk to the public, because if there were a danger to the public health, the seizure would be permissible (even under Lev’s standard) as falling within the first exception to § 304(a)(1)(B). Essentially, then, one must consider the extent to which a violation of the law that causes no harm, or the harm of which is merely in the ‘deception’, or even the harm of which is to the consumer’s wallet, merits FDA action. Perhaps we need to separate these categories out, or perhaps, as the *Mytinger and Casselberry* Court noted, it is Congress’s job to do so.

Regardless of the merits of this proposal, it emphasizes the importance of balancing harms in a way that is relevant to a California case, *People v. Rath Packing Company, Inc.*⁷⁷ Rath involved the alleged violation of state law, and the relation of state law to the federal Wholesome Meat Act not the FD&C Act,⁷⁸ but the case contains a valuable discussion of due process. The defendant, Rath Packing Company Inc. (Rath) sold

⁷⁵ *Id.* at 72-73.

⁷⁶ See Lev, *supra* note 48, at 544-45.

⁷⁷ 149 Cal.Rptr 431 (Cal. Ct. App. 1978).

⁷⁸ See *id.* at 438 n.6 (“The reference to the Federal Food, Drug and Cosmetic Act in section 12211 [of the California Business and Professions Code] has no bearing on the issues presented in the case at bench since that act expressly excludes meat food products from its coverage to the extent that its provisions conflict with those of the Wholesome Meat Act. (21 U.S.C. s 392.)”).

packages of bacon that were allegedly short-weighted, that is, that contained less bacon than indicated on the label. California officials claimed Rath “intended to and has deceived, misled and otherwise induced substantial numbers of consuming public into purchasing its bacon products,”⁷⁹ and that the company “was in violation of California laws prescribing...false advertising...[,] unfair competition...[, and] misbranding...”⁸⁰ The court determined that the federal law would pre-empt the state law, but that state law could be employed where it did not conflict with the federal standard,⁸¹ including use of the state’s own enforcement or sanction mechanisms.⁸² One of these enforcement mechanisms was the use of California “off-sale” procedures. Under California law, Business and Professions Code section 12211, officials can “order the removal from sale of falsely labeled packages, without provision for notice or hearing, until the particular defect is cured.”⁸³ Although this may be likened to an injunction in that the packages are not actually held by officials but returned to Rath, it is closer to a condemnation in that the company has already produced its goods for sale and shipped them out and is then forced to destroy them as a result of the off-sale order.⁸⁴ Regardless, the court held that the off-sale procedure did not guarantee Rath a hearing during the shelf-life of its bacon, and therefore that it constituted a denial of due process as applied to Rath.⁸⁵ The crucial aspect of the court’s determination that the off-sale procedures violated due process was its use of a balancing test: “[W]e

⁷⁹*Id.* at 436.

⁸⁰*Id.* at 436-7. Relevant California provisions include Cal. Bus. & Prof. Code § 17500, Cal. Civ. Code § 3369, Cal. Health & Saf. Code §§ 26550, 26551, and Cal. Bus. & Prof. Code §§ 12024, 12024.5, and 12211. *Rath*, 149 Cal.Rptr at 437-8.

⁸¹*Rath*, 149 Cal.Rptr at 442-3.

⁸²*Id.* at 443.

⁸³*Id.* at 447. *See also id.* at 438 n. 6 (Cal. Bus. & Prof. Code § 12211). The “off-sale orders may be tested after the fact, by petition for writ of mandamus or action for injunction under state law...” *Id.* at 447. As such, this is not the case of seizure with no opportunity at all for a hearing, but rather, like the examples discussed thus far, no notice or opportunity for a hearing *pre-seizure*.

⁸⁴*Id.* at 447-8. *See also id.* at 447 (describing how courts have relied on *Mytinger and Casselberry* in upholding the use of off-sale procedures). The weights and measures official may also “seize as evidence any package or container which is found to contain a less amount than represented.” *Id.* at 438 n.6.

⁸⁵*Id.* at 447-8.

have balanced the public interest sought to be protected, i.e., the right of the consumer to be free from misbranded goods, against the deprivation suffered by Rath.”⁸⁶The court here took a sophisticated, realistic approach to the problems raised by seizure law. It considered many of the concerns noted in this paper:

The evidence produced at trial revealed that on at least three occasions...the prescribed testing procedure resulted in Rath’s bacon being ordered off sale when it should not have been.... It may be anticipated that many more such errors will occur when appellants begin to enforce the more complicated federal standard. Further, the record indicates that Rath bacon which was actually underweight was only so in miniscule amounts, rarely exceeding a few fractions of an ounce. We point out, however, that if the governmental interest involved here was the protection of the public from the consumption of adulterated, and not merely short-weighted food, we would have to strike the balance in favor of that interest, irrespective of the fact that the product ordered off sale is highly perishable.⁸⁷

The misbranding that took place here, even under the best case for the government, was relatively minor, and in the worst case, wrong. While this does not mean that Rath should escape punishment for illegal acts, it does illustrate the benefit of a rational approach.

Just what this rational approach means may depend on the facts at hand. In this case, the court recognized that a full hearing before the off sale procedure went into effect would be impractical for government officials, and decided that due process required a “flexible” approach.⁸⁸The court determined some general guidelines for this type of case: a meat packer like Rath is entitled to notice, reasonably calculated to reach the packer, and an opportunity for a hearing *before the responsible enforcement agency*, all within a period that the product “will not have substantially depreciated in value should it be determined that the detention or off-sale order was erroneously issued.”⁸⁹This corresponds to Lev’s desire that libel hearings be advanced in the trial calendar, but instead mandates a speedy hearing before the agency instead of the courts.

⁸⁶*Id.*

⁸⁸*Id.* at 449.

⁸⁹*Id.* at 449 & n.23.

On what basis did the court choose this flexible due process approach? The court points to a trend in decisions by the U.S. and California high courts recognizing the need to balance the considerations between the parties in a due process case.⁹⁰ This theory was developed in a number of cases in the 1970's and beyond, in the context of benefits terminations,⁹¹ school expulsions,⁹² utility shut-offs,⁹³ and soon.⁹⁴ It recognizes that the governmental interest may be important, but that because the Constitution safeguards an individual's property rights, the disposition of such a right must be handled carefully.

In some ways, the individual's right is more abundantly clear in FDA seizure cases than in the cases just cited; the property right an owner has in her goods for sale is more evident than the 'property' right a student has in getting an education, or an employee has in maintaining her job. Most of these latter cases, however, do not involve a danger or emergency to the public or the government. The leap that the *Rath* court took was in recognizing that the *government's* right to act (and, by implication, the public's right to be protected) could legitimately be put on the scale with the owner's private interest. *Rath* determined that it was necessary to figure out what danger the potentially illegal product presented, and to what extent this danger was real.

Many of these "flexible" due process cases provide the requisite protection by insisting on an *administrative*

⁹⁰*Id.* at 449. The court points to *Goss v. Lopez* 419 U.S. 565, 95 S.Ct. 729 (1975) (public school students have property interest in their education, entitled to notice and hearing before long suspension or expulsion from school), *Arnett v. Kennedy*, 416 U.S. 134, 164, 94 S.Ct. 1633, 1649 (1974) (employee has property interest in job and is therefore entitled to notice and opportunity to respond before discharge; Powell, J., concurring, emphasizing the fairness considerations to each side), and *Skelly v. State Personnel Bd.*, 124 Cal.Rptr. 14, 539 P.2d 774 (Cal. 1975) (due process required notice and opportunity to respond before employee could be discharged).

⁹¹*Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) (due process requires that pre-termination evidentiary hearing be held before public assistance payments to welfare recipient are discontinued).

⁹²*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) (process due to terminated school district employees was pre-termination opportunity to respond, coupled with post-termination hearing).

⁹³*Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554 (1978) (notice and administrative hearing required before utility company may discontinue consumer's services).

⁹⁴*Cf. Gilbert v. Homar*, 520 U.S. 924, 117 S.Ct. 1807 (1997) (recognizing due process right of employee to pre-termination hearing, but emphasizing the limited nature of that hearing).

hearing,⁹⁵ as already described in the case of *Rath*. The requirement of full agency hearings could help resolve due process problems. Although an agency might not have as many resources as a court, the wisdom of pursuing a seizure action is something that only the former can take into account when allocating its resources. Moreover, an administrative hearing need not tax the agency's resources greatly.⁹⁶ The advantage of such a procedure is that it gives the property owner, at the very least, an opportunity to justify her actions, and it gives the FDA a sense of the likelihood of its success on the merits. Certainly this seems a wise solution in the misbranding context, where, as described, the emergency may be lacking. Of course, if the agency determination is reviewable by the courts, efficiency is lost and a burden is placed on the judiciary; on the other hand, without review, the responsible agency is hardly constrained to act any more fairly in the context of the administrative hearing. The latter concern, however, is probably overstated, as the hearing mechanism at least provides some accountability and offers the agency the chance to clear up well-intentioned mistakes on its part.

The mechanism could be something akin to a bail hearing. In the criminal context, the court determines, based on the various factors that weigh on both sides, the bond that should be set. In some cases, the risk to the public is too great to merit any type of bail, in other cases, the risk of flight is too great.⁹⁷ Nevertheless, the court recognizes that in many cases the protected liberty interest is more significant than the projected harm. It does not make sense in the food and drug context to offer bail, *per se*. The concept, though, of a judge determining quickly the merits of the case, the harm to the producer, the needs of the agency, the

⁹⁵ *Goldberg v. Kelly*, 397 U.S. at 263-64; *Loudermill*, 470 U.S. at 545-46.

⁹⁶ "Affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays." *Loudermill*, 470 U.S. at 544.

⁹⁷ See, e.g., *U.S. v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095 (1987) (discussing, in case about Bail Reform Act, factors that go into bail determination, and holding that protection of community and prediction of dangerousness were valid concerns not barred by Constitution).

possibility of multiple libels being brought, etc., can be transported to the food and drug context, on an administrative or quasi-judicial/quasi-administrative level. The fact that currently there are relatively few seizures these days only strengthens the argument that this protection is easily provided, if not abundantly necessary in most cases.

In *Rath*, constitutional concerns affected actions by California officials with responsibilities not unlike those of the FDA. Due process, under the Fifth and Fourteenth Amendments (as well as state constitutions), is relevant to state officials, municipal officials, and federal officials including agents of the FDA. It is important to map out consistent principles under the due process clause in order to ensure that these various governmental agents will act appropriately and fairly in all circumstances.

III. The Seizure Power and the Right Just to Compensation

A. *Explanation of the Right*

The Fifth Amendment, after setting out an individual's due process rights, states: "[N]or shall private property be taken for public use, without just compensation."⁹⁸Property here is not limited to real property.⁹⁹Despite the language of the Constitution, it is clear that the government *may* seize private property in certain instances without providing compensation, as an exercise of its police power. The question, for our purposes, is in what instances specific governmental action in seizing property may be seen as an exercise of its police power as opposed to a taking for public use that requires compensation.

⁹⁸U.S. CONST., amend. V (1791).

⁹⁹*See, e.g.,* *Pete v. U.S.*, 531 F.2d 1018 (Ct. Cl. 1976) (government action that deprived plaintiffs the use of their cabin barges constituted a taking for which they were entitled to compensation).

In the case of FDA seizures, the owner of the commodity seized by the administration is deprived of her property. In the event that the commodity somehow violates a provision of the FD&C Act, however, the seizure is valid; the product is illegal, and therefore no compensation need be paid. Once it has been determined that the commodity is illegal, it in fact appears that the claimant loses all property rights to it whatsoever. In *Provimi, Inc. v. U. S.*,¹⁰⁰ claimant's supply of animal feed and drugs were seized under the FD&C act as adulterated. Provimi entered into a consent decree authorizing the release of some of the property for reconditioning,¹⁰¹ but the government was dilatory in returning the items, resulting in economic loss. Provimi claimed that the delay constituted a taking. The Court of Claims determined that once the items had been condemned (as stipulated in the consent decree), the claimant had no right to have them returned and therefore was not entitled to compensation for the government's withholding of the property: "[P]laintiff had no property right after the condemnation. The statutory scheme plainly works a complete divestiture of the property rights of the owner of the condemned goods."¹⁰² As such, the withholding of the property between its seizure and its release for reconditioning was not a taking.¹⁰³

The issue then arises whether a seizure of a product that is not adulterated, misbranded, or otherwise in violation of the statute but that is seized *upon suspicion of such*, is a taking that requires compensation.

Underlying this issue are several questions. What sort of behavior merits a taking – must an agent act

¹⁰⁰680 F.2d 111 (Ct. Cl. 1982).

¹⁰¹This may be done at the discretion of the court, and requires that the erstwhile owner of the goods pays all the necessary fees.

¹⁰²*Provimi* 680 F.2d at 114.

¹⁰³The court also determined that the government was not in violation of the reconditioning provisions of the FD&C Act, 21 USC § 334, in that release for reconditioning is discretionary, and therefore the government cannot be in violation of the statute whatever action it subsequently takes regarding the property. *Provimi* 680 F.2d at 113-4.

arbitrarily in seizing a commodity for it to be compensable (assuming it is later shown that the seizure was unfounded)? What if the official acts negligently? In good faith? In bad faith? With probable cause? Furthermore, what harm must the owner of the property suffer in order to be compensated? Is mere loss of use for a certain amount of time compensable?¹⁰⁴ Must there be damage to the item? Total destruction? Moreover, from who can the owner of the property obtain redress? The official? The state? Are there laws that protect the agent's actions, or that transfer the obligation from the official to the state? Finally, given the relative infrequency with which the FDA pursues seizure actions, the unlikelihood of such an action going to trial, and the slim possibility that the FDA will lose this kind of case, is there even any reason to worry about compensation in this circumstance? Although not all of these questions have clear answers, it is important to keep them in mind in the context of this inquiry. Nevertheless, to the extent that the law fails to recognize wrongful seizures as compensable acts, the above considerations are mostly theoretical.

B. *Origins of Takings Law: Miller v. Horton*

In order to understand the takings question more clearly, it is useful to view it from a historical perspective.¹⁰⁵ Although there is much takings law, it is helpful to find a case that deals with the specific question that we have set out: whether wrongful seizures constitute takings. An early, well-known case that addresses the issue of compensation in this specific context is *Miller v. Horton*.¹⁰⁶ In that case, members of

¹⁰⁴The Supreme Court has indicated that a temporary property deprivation may be considered a taking. See, e.g., *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2388 (1987) (“These cases reflect the fact that “temporary” takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”).

¹⁰⁵According to Catherine R. Connors, the just compensation clause has its roots in early English law; the Magna Carta describes something roughly akin to due process, and in the sixteenth and seventeenth centuries the law began to reflect the concept of compensation. In America, Vermont in 1777 and Massachusetts in 1780 were the first to expressly require just compensation in their state constitutions. Catherine R. Connors, *Back to the Future: The “Nuisance Exception” to the Just Compensation Clause*, 19 CAP. U. L. REV. 139, 148-151 (Winter, 1990).

¹⁰⁶26 N.E. 100 (Mass. 1891).

the Rehoboth, Massachusetts, board of health killed the plaintiff's horse under a statute that authorized the destruction of diseased animals. The trial court judge found that the horse was not diseased, but ruled that the defendants were justified in destroying the animal.¹⁰⁷ Oliver Wendell Holmes, before his tenure as a Supreme Court justice, wrote the decision of the Massachusetts Supreme Judicial Court on appeal, reversing.

The case, at first blush, seems mostly about the due process considerations addressed in the first part of this paper. Indeed, Holmes emphasizes the importance of notice and hearing (preferably before seizure and destruction, but where necessary, afterward), and he implies that if the statute does not give the owner the opportunity to be heard, the opportunity will come when the owner sues whoever killed his healthy horse. It is near the end of the decision, however, that Holmes explicitly discusses takings doctrine, stating:

When a healthy horse is killed by a public officer, acting under a general statute, for fear that it should spread disease, the horse certainly would seem to be taken for public use¹⁰⁸ as truly as if it were seized to drag an artillery wagon. The public equally appropriates it, whatever they do with it afterward.¹⁰⁹

He then goes on to question whether the law sanctions the destruction of healthy animals, and in dictum suggests that it would be “a serious question” whether such a regulation, if it did not provide compensation to the deprived owner, could be upheld.¹¹⁰ It is not perfectly obvious whether Holmes in fact believes that any destruction of someone's horse, whether the animal is diseased or not, is a taking requiring compensation; in any event he does seem to hold that the wrongful destruction of a healthy horse requires compensation.¹¹¹

¹⁰⁷ *Id.* at 100.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 101. Holmes does draw a distinction between the destruction of a diseased horse versus a healthy horse, and determines that the statute does protect the former act. *Id.* at 102. He notes that in nuisance cases, the legislature may define the law narrowly or broadly; it might make a law calling for the destruction of only very sick horses, or of horses altogether. *Id.* Holmes states that regardless of how the legislature defines the nuisance, the owner has the right to question whether his property fits the legislative description, and if so, whether “the line drawn is valid one under the police power.” *Id.* Holmes seems to be suggesting that an act could be a taking even if it were to fall on the regulated side of the line – that a law that called for

The dissent vigorously protests Holmes' conclusion. Justice Devens emphasizes the "well recognized" distinction between the power of eminent domain and the police power, the latter of which gives the state the authority to control property even if to the owner's disadvantage.¹¹² He explains:

[L]aws passed in the lawful exercise of the police power are not made unconstitutional because no provision is made for compensation to the individual whose property may be affected thereby. They are passed for the protection of the community against the ravages of fire, the spreading of pestilence, and the prevention of other serious calamities, and such property is not taken for any use by the public within the meaning of the constitution. . . . [The validity of nuisance laws] rests upon the necessity of providing for the public safety, and the individual is presumed to be compensated by the benefit which such regulations confer upon the community of which he is a member. . . .¹¹³

In *Miller*, then, we find the outline of the takings question. The rights of the parties are eloquently defined: on the one hand, the individual gives up an asset for the public good, and should be compensated for his benevolence; on the other hand, the benefit that inures to the individual is that of being a member of the community. To an extent, the nature of the article in question shapes the debate; the owner of a diseased horse is not acting in bad faith by owning that horse, which might not be true of, say, a producer who calls colored water apple juice. It is a *framing* issue: Holmes seems to empathize with the poor horseman who is the victim of not one but two influences outside of his control: Disease and the Board of Health. In this view, requiring just compensation is a form of insurance. Justice Devens' dissent implies that no one can predict the things that life will throw his way, and that 'fate happens' to us all. In his view, neither diseased nor healthy animals should be compensated for unless the legislature declares it, thus forcing the owner to self-insure for *any* harm that might come to his property.¹¹⁴

the destruction of all horses would encompass validly owned horses, and that, if enforced, such a law, though legitimate, would require compensation to the aggrieved owner.

¹¹²*Id.* at 103 (Devens, J., dissenting).

¹¹⁴*Cf. Miller*, 26 N.E. at 104 (Devens, J., dissenting): "The contention that the law is unconstitutional, so far as animals

It is, however, unclear from Justice Devens' dissent to what extent the governmental regulation needs to be aimed at the prevention of terrible rather than moderate harms for it to be considered an exercise of the police power. In his dissent, as quoted above, he seems to imply that traditional nuisance laws were designed for the prevention of *serious calamities*.¹¹⁵ Although other language in his dissent accords great deference to the legislature, one wonders whether he would approve of any legislative decree irrespective of its breadth and the deprivation that it entails. This is important in the modern food and drug context, as the accidental (or even intentional) misbranding of a condiment¹¹⁶ hardly seems to qualify as a serious calamity.

The case also addresses the issue of who may be sued and on what grounds. Justice Devens remarks that the defendants killed the horse under the auspices of an official body (the "commissioners of contagious diseases among domestic animals") that was lawfully created by the legislature and that had the legal authority to grant the board of health power to kill the horse in question.¹¹⁷ In other words, the defendants (the board

actually tainted are concerned, cannot be maintained unless it is true that every police regulation affecting the use of property, or authorizing the destruction of property as dangerous to the community, is unconstitutional except when it provides for repayment to the owner."

¹¹⁵There may actually be some distinction between condemnations under the police power and those under nuisance law. Catherine R. Connors explains that this distinction was first articulated by the Supreme Court in Justice Rehnquist's dissent in *Penn Central Transportation Co. v. City of New York*, 428 U.S. 104 (1978). She states that under the nuisance exception, "a court is less likely [than under general laws] to find a need for compensation where the regulation at issue suppresses certain deleterious property uses." Connors, *supra* note 105, at 139. According to her, the *Penn Central* dissent defined the nuisance exception as applying to the "safety, health, or welfare" of the public and noted that it is not "coterminous with the police power." *Id.* at 141. In other words, (nuisance) laws that specifically protect the public health might give the state a firmer foothold for denying compensation than does the police power in general.

¹¹⁶*See*, Libby, McNeill & Libby v. United States, 148 F.2d 71, 72-73 (2d Cir. 1945) (holding that tomato catsup conforming to government standard except for addition of small quantity of sodium benzoate, a harmless preservative, purported to be tomato catsup notwithstanding fact that it was truthfully labeled as "tomato catsup with preservative," and hence was misbranded and subject to condemnation)

¹¹⁷*Miller*, 26 N.E. at 104 (Devens, J., dissenting).

of health) were merely following orders.¹¹⁸ It is interesting to note that the board of health (responsible for executing the law), the commissioners (whom Justice Devens describes as acting “semi-judicially”), and the state itself (in part in its executive, in part in its legislative capacity) all bear some responsibility for the error, and all are potential targets for litigation. Here, the plaintiff chose to sue the board members as individuals, and the court apparently approves. Again, we have a framing issue: the majority per Holmes views the defendants not as obedient public servants, but rather as something closer to criminals (or malicious tortfeasors) who willfully murdered Mr. Miller’s horse. From this perspective, the plaintiff was entitled to compensation from them.

The statute in *Miller* provides that the state *may* compensate individuals whose property is destroyed.¹¹⁹ This legislative solution to the problem may diminish the harshness of an overly harsh nuisance law in certain instances.¹²⁰ Such a scheme has generally been set up in modern day cases involving the destruction of diseased animals.¹²¹

Although historically important, *Miller* itself is no longer precisely good law. It has been invalidated on the issue of immunity for public officials. Under *Miller*, officials who got things wrong were deemed to be acting

¹¹⁸Justice Devens, in his dissent, states that he believes that the board of health officials should be immune on these grounds: “[A]s an officer is protected by his warrant, if it issue from a court having jurisdiction, no matter what previous error may have been made which led to the issuance of it, so the defendants, who simply executed the decree of a tribunal which was competent to deal with the subject, and which the legislature had created, cannot be made responsible for any error committed by it in its adjudication.”

Id. at 104.

¹¹⁹*Miller*, 26 N.E. at 100.

¹²⁰And the lack of such a provision might point to some statutory infirmity. *See, e.g.*, *John Yensen v. State of Ohio*, 1899 WL 761, *10 (Ohio Com.Pl. 1899), where the judge remarked that the statutes’ explicit denial of compensation (or access to courts to pursue a remedy) was a strong indication that the power granted to local game wardens and sheriffs to seize fishnets was overly broad.

¹²¹*See, e.g.*, *Yancey v. United States*, 915 F.2d 1534, 1536 (1990).

at their own risk. In the 1973 case of *Gildea v. Ellershaw*,¹²² however, the Supreme Judicial Court effectively abandoned this rule. Now, public officials acting in the course of their duties are generally protected, except in cases of “bad faith, malice or corruption.”¹²³ Despite this narrowing of *Miller*, however, the question remains whether a property owner has redress when her property is seized wrongfully.

C. Modern Day Claims: Fairness versus the Public Good

The importance of framing the problem in a certain light can be seen in many modern just compensation cases. One such case is *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*¹²⁴ The Florida Department of Agriculture learned that citrus canker had been detected in the nursery from which the respondents purchased their trees; on inspection, however, it did not find that respondents’ trees were infected. The Department ordered that the respondents’ nursery stocks be burned, nevertheless, as a public safety measure.¹²⁵ As the trees were healthy, the nurseries claimed that the Department’s action amounted to a taking requiring compensation; the Department, on the other hand, justified its action as necessary “in order to prevent a public harm.”¹²⁶ The court ruled that the burning did in fact amount to a taking.¹²⁷

¹²²298 N.E.2d 847, 853 (Mass. 1973) (action for damages for attempted removal from office).

¹²³*Id.* at 859.

¹²⁴521 So.2d 101 (Fla. 1988).

¹²⁵*Id.* at 102.

¹²⁶*Id.* at 102-3.

¹²⁷*Id.* at 103-5. The court also notes that the state’s lack of a possessory interest in the property in no way diminishes the likelihood that the action was a taking.

Notably, in *Mid-Florida Growers*, the taking is not wrongful in the sense that the Department made a mistake. Rather, the Department consciously destroyed healthy trees as a precautionary measure. The case, then, tests the limits of governmental authority in regard to the police power – can the government take direct, intentional action and still be liable?¹²⁸ The court acknowledges that “a regulation or statute may meet the standards necessary for exercise of the police power *but still result in a taking*.”¹²⁹ In other words, there can be a compensable taking even in the face of valid regulatory action under the state’s police powers. The court cleverly shirks the issue of clarifying the parameters of the police power by *framing* the agency action as the creation a public benefit as opposed to the prevention of a harm,¹³⁰ thus leaving the reader to assume that only the former type of police action will be considered a taking.¹³¹ Use of one’s property to benefit the public is compensable, but where one’s property is taken to prevent a public harm, the owner bears the loss. It is a fine line. The court frames the Department’s action as cautious but *unnecessary*, in a sense creating the impression in the reader that harm was not actually imminent. The majority’s reasoning should strengthen the contention that compensation should lie in the case of a well-intended but *wrongful* seizure, if only because such an action may similarly be characterized as a public benefit (because an unjustified seizure would not in fact prevent any harm).

¹²⁸The court notes that the respondent’s were not permitted to challenge the propriety of the action itself, but rather only the resultant failure to compensate for the damage done. *Id.* at 103.

¹²⁹*Id.* at 103 (emphasis added). In *State Plant Board v. Smith*, 110 So.2d 401, 405 (Fla. 1959), involving similar facts, the court also recognized the sometime right to compensation in public nuisance cases, and it explicitly distinguished cases involving the police power from those in which property has been appropriated for public use.

¹³⁰“We, however, agree with the district court’s conclusion that destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida’s economy, thereby conferring a public benefit rather than preventing a public harm.” *Mid-Florida Growers*, 521 So.2d at 103.

¹³¹Chief Justice McDonald disagrees with the majority’s conclusion on this score. He claims that the Department’s action was related to the prevention of the spread of citrus canker, which is a public harm. He conceives of the potential outbreak of the disease as a serious emergency. *Id.* at 105-106 (McDonald, C.J., dissenting).

Mid-Florida Growers involved state agencies, state law, and likely, although it is not explicit, the state constitution.¹³² Jurisprudence under the Federal Constitution is similarly complex. A relevant case under federal law is *Yancey v. United States*.¹³³ Yancey involved turkey farmers who were forced to quarantine their healthy birds during an outbreak of avian influenza, and who ultimately decided to sell their birds at a loss rather than maintain them (at a loss) in the quarantine.¹³⁴ The scenario in *Yancey* is comparable to that in *Mid-Florida Growers*, in that the Yancey's turkeys were not diseased, yet they were subject to the quarantine regulation. A statute authorized that farmers who were forced to destroy their livestock or poultry be compensated, but it did not protect those in the Yancey's position whose flock suffered economically but not physically from the disease.

The court determined that the Yanceys suffered a severe setback and that their claim fell within the spirit of the Fifth Amendment, and it therefore found the loss of value resulting from the quarantine to be compensable. This can be contrasted with the result in *Empire Kosher Poultry, Inc. v. Hallowell*.¹³⁵ The facts of that case are very similar to those in *Yancey*; the Third Circuit, however, reached the opposite conclusion. It cited authority in support of the proposition that the police power gives the state the authority to act in the public interest and emphasizes the legitimacy of the quarantine.¹³⁶ It noted that, although there was a federal law in place that provided for payment to those farmers whose stock was destroyed as a result of the disease, no compensation to those farmers was in fact *required*; it viewed Empire as being in a comparable position

¹³²Cases may also be brought under the Fourteenth Amendment to the U.S. Constitution. Although the Fourteenth does not have an explicit just compensation clause, it is understood that the Amendment's due process guarantees encompass that right. See, e.g., *Miller v. Schoene*, 276 U.S. 272, 277, 48 S.Ct. 246, 246 (1928) (involving the destruction of cedar trees to prevent disease). Moreover, the Fifth Amendment applies to the states via the Fourteenth Amendment. See, e.g., *Webster v. Moquin*, 175 F.Supp.2d 315, 324, n. 10 (D. Conn. 2001).

¹³³915 F.2d 1534 (Fed. Cir. 1990).

¹³⁴*Id.* at 1536-7. The taking here involved the loss of value in the turkeys as they were purchased for use in hatching eggs but were sold as meat because it was forbidden to sell the eggs interstate during the quarantine.

¹³⁵816 F.2d 907 (3d Cir. 1987).

¹³⁶E.g., *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246 (1928) (justifying use of police power to protect public interest).

without the benefit of the statute.¹³⁷ Ultimately, the court bases its decision to deny Empire compensation on the need to maintain public health and the fact that Empire suffered a diminution in the value of its property rather than a total loss.¹³⁸

Clearly, the federal courts are not in agreement as to what factors constitute a taking, even when, as here, the factual situations were essentially identical. The Third Circuit seemed to rely on public safety considerations. The Federal Circuit, in looking toward the Yancey's interests, set out three classic factors to be considered in determining whether a taking occurred: "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."¹³⁹ It is unclear, however, the extent to which it actually relied on these factors. A pair of commentators has suggested that it was considerations of fairness that motivated the court to rule in favor of the Yanceys.¹⁴⁰ Depending on *how the courts frame the issue*, in terms of well-meaning government actors or poor farmers, opposite results may be reached, but no distinct legal principle relied on by either

¹³⁷9 C.F.R. § 81.15 (1984). *Empire*, 816 F.2d at 911 n.4.

¹³⁸*Empire*, 816 F.2d at 915-6.

¹³⁹*Yancey*, 915 F.2d at 1549, citing the seminal case of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2649 (1978).

¹⁴⁰They write:

[I]t could be argued that the Yanceys lost on all three prongs of the [*Penn Central*] analysis. First, the governmental purpose was critical and the nexus was clear. Second, the diminution of value of the property was only seventy seven percent. Third, it could be said that owners of poultry farms should anticipate USDA regulations which could adversely affect their investment decisions. Nevertheless, this case... illustrates the point that the overarching concern of the court in the takings inquiry is the underlying equity of the situation. In *Yancey*, the turkey farm owners had started the business just one month before the quarantine was put into effect. More importantly, they were a small "mom and pop" operation that was put out of business as a result of the quarantine, although not a single one of their turkeys or eggs was infected with the virus. The court clearly considered unfair the governmental policy of reimbursing only those poultry owners with diseased stock. Therefore, the court's factual inquiry found a constitutional means of redressing the inequity."

Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens that in Fairness and Equity Ought to be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549, 564-65 (Spring 1991) (arguing that the Claims Court has been successful at resolving takings claims based on ad hoc equity considerations).

court emerges. It does appear that the courts analyzed the specific facts closely in order to fairly balance the public versus private interest. Marzulla and Marzulla describe the balance achieved in *Yancey* and other Federal Circuit cases as follows: “[T]akings jurisprudence in the Claims Court has developed into a very *specialized and fact-intensive process* which focuses on the equitable adjustment of the burdens that ‘in fairness ought to be borne by society as a whole rather than [by] an individual property owner.’”¹⁴¹ This sort of close factual analysis in conjunction with a balancing process could be important in the food and drug context, as it the importance of weighing the specific governmental interest against the specific private interest has already been noted. The takings cases discussed thus far, however, involved deprivations that were the result of influences outside the control of *both* parties. A very different balancing process comes into play if we ask, what if one or the other party is culpable?

One such situation is a criminal trial – either the state or the accused will eventually be vindicated. A good example of the takings question in the criminal context is when evidence is seized in anticipation of a trial. In *Emery v. State*,¹⁴² for example, the plaintiff’s truck was seized and dismantled as part of an investigation into a potential murder. After the plaintiff plead to a lesser crime, the truck was returned to him in damaged condition.¹⁴³ The trial court ruled that the loss in value of the truck constituted a compensable taking, and awarded the plaintiff damages.¹⁴⁴ The Oregon Supreme Court reversed, determining that the obligation to

¹⁴¹*Id.* at 565 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (emphasis added).

¹⁴²688 P.2d 72 (Or. 1984).

¹⁴³*Id.* at 73-74.

¹⁴⁴*Id.* at 75. The trial court determined that the seizure was a taking under the Oregon constitution. Nevertheless, the Oregon Supreme Court notes at 77, that the provision in the state constitution is coextensive with the federal version, and relies for its holding on a federal case involving the Fifth Amendment.

provide evidence in a criminal case is a public duty.¹⁴⁵ Turning evidence over for trial is a function of being a member of the society, since every citizen can potentially be in the position in which Emery found himself. Yet, there is an implicit acknowledgement that the accused is in a sense individually responsible for the predicament, that all members of society are not equally likely to be in Emery's place, as otherwise it would make sense to shift the burden to society as a whole.

There are two strong dissents in *Emery*, both of which emphasize the constitutional arguments for providing compensation to the plaintiff. Justice Linde (joined by Justice Lent) remarks:

[T]he state doubtless would have to pay compensation if it used plaintiffs' pickup truck for some other public purpose, for instance for transportation, and the compensation would take into account any diminution in value from wear and tear or damage during the state's use.¹⁴⁶

Hence he calls into question the extent to which public use means public necessity, and the extent to which use in a criminal trial can be accurately described as the former.

The dissenters also emphasize that the case may be used as precedent for the proposition that innocent third parties need not be compensated for their losses, even if they are crime victims.¹⁴⁷ In a Note in the Northwestern University Law Review, Spencer M. Punnett II writes about the dissenters' concern for innocent parties.¹⁴⁸ He also describes how the fear of rewarding criminals motivated the majority:

The state of Oregon's concern, however, was made manifest by the appellate judge in *Emery*, who described the state's appeal to him as imbued with a 'sense of outrage' that a criminal should recover damages for police actions that were reasonably necessary in order to gather evidence toward his conviction.¹⁴⁹

¹⁴⁵ *Id.* at 78.

¹⁴⁷ See *id.*, at 81. Cf. *Wallace v. City of Atlantic City*, 608 A.2d 480 (N.J. Super. Law Div. 1992) (holding that damage caused to innocent third party landlord's property during police search constituted a compensable taking).

¹⁴⁸ "As one dissenting justice pointed out, under the *Emery* rule, the property that is destroyed for evidentiary purposes without compensation might belong to a bystander or even to the victim of the crime – adding further to the victim's suffering." Spencer M. Punnett II, Note, *The 'Takings' Clause and the Duty to Provide Evidence: An Alternative Analysis of Emery V. State*, 80 NW. U. L. REV. 1094 (Winter 1986).

This fear of rewarding wrongdoers might be rational, but not to the extent that it fails to recognize that the innocent are *generally* not as culpable as ‘proven’ criminals. The dissenting justices get this to a degree; however, they do not make the leap from bystanders and victims to the wrongfully accused. Yet there is no fundamental reason to distinguish between them.¹⁵⁰ The Note proposes a procedural mechanism for separating the innocent from the guilty that will be examined later in the paper.¹⁵¹ At this point, it is important to ask whether we would rather err on the side of one or the other of the parties. The *Emery* dissents suggest that the rule should favor compensation to the general populace (even the culpable Mr. Emery) in order to protect the innocent, while the majority seems to favor a blanket rule that defers to governmental interest, framed as respect for the police power and public safety.

D. The Tucker Act and the Federal Tort Claims Act: Getting into Court

The entire discussion to this point is only relevant if there is someone to sue. As noted earlier in regard to *Miller v. Horton*, the responsibility for a taking may lie in several places. In some states, if an official is acting within the scope of her official duties, she is entitled to qualified immunity, assuming she does not act in bad faith or with malice.¹⁵² A formulation in the federal context suggests that government officials may

¹⁵⁰The Note, on the other hand, while not focusing on the wrongfully accused, does mention him in passing. 80 NW. U. L. REV. at 1110.

¹⁵¹See part III, F, *infra*.

¹⁵²See, e.g., *Friend v. Brankatelli*, 482 N.E.2d 1284, 1285 (Ohio App. 1984) (holding that apartment owner’s suit against public officials was barred for owner’s failure to first pursue administrative remedies); *Gildea v. Ellershaw*, 298 N.E.2d 847, 853 (Mass. 1973). Cf. *McMahon v. City of Telluride*, 244 P. 1017, 1018 (Colo. 1926) (“Where the property is not in fact a nuisance, if the city is not liable in tort, because of the rule above mentioned and relied on by the city in the instant case [which protects the government when acting under its police powers], the municipality is nevertheless liable upon the theory that it must grant compensation for private property that it takes for public use. If certain property is in fact a nuisance, its destruction as such may not give rise to any right to compensation; but if property is destroyed under a mistaken belief that it is a nuisance, when in fact it is not a nuisance, it is taken for a ‘public use’ within the meaning of the constitutional provision,

only be sued as individuals for violations of “clearly established” rules of federal law.¹⁵³ Still, there is ongoing debate as to the exact parameters of governmental immunity for officials in their individual capacities. Our concern is with the right to sue the government, as well as its agents, in their official capacities.

When the FDA seizes someone’s property, it acts under the authority of the government of the United States. Administrative agencies generally may not be sued for damages.¹⁵⁴ The United States itself is protected by sovereign immunity, and therefore, in order to bring suit against it, Congress must have authorized the action.¹⁵⁵ There are several sources of law that provide individuals the right to sue the government. In the context of this paper, the two most important sources are the Tucker Act¹⁵⁶ and the Federal Tort Claims Act.¹⁵⁷

The Tucker Act has no substantive base, but rather it indicates the type of cases for which the United States and the loss to the owner should be made good.”).

¹⁵³ “[G]overnment officials performing functions generally are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Tchirkova v. Kelly*, 1998 WL 125542, *8 (E.D.N.Y., 1998) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727 (1982)). “Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action.” *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038 (1987) (citing *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2739).

¹⁵⁴ *Vigil v. U. S.*, 293 F.Supp. 1176, 1181 & n.2 (D. Colo. 1968) (dismissing claims against the Departments of Justice, Interior and Agriculture, and Bureaus of Land Management and Internal Revenue, as well as the Civil Rights Commission). The Administrative Procedure Act does not give individuals the right to sue the government for monetary damages based on agency action, but only for relief other than monetary damages. Although there is some confusion as to what constitutes monetary damages, compensation for lost or damaged property falls under that definition. If the individual is seeking a return of his property rather than monetary damages, however, the APA could provide an avenue for relief. *U.S. v. Chambers*, 92 F.Supp.2d 396, 399-400 (D. N.J. 2000) (denying individual compensation for property not returned to him after his arrest and conviction for drug crimes).

¹⁵⁵ *See, e.g., Martyniuk v. Com. of Pa.*, 282 F.Supp. 252, 255 (E.D. Pa. 1968) (“It is now well settled that civil liability may not be imposed upon the sovereign except to the extent and in the manner to which it has consented”).

¹⁵⁶ 28 U.S.C. § 1491.

¹⁵⁷ 28 U.S.C. § 2671 *et seq.* (1994) (in conjunction with 28 U.S.C. § 1346(b)).

has consented to suit.¹⁵⁸Hence, in the case of a taking without compensation, the constitutional violation is what gives rise to the Tucker Act claim. Suits under the Tucker Act that are for more than \$10,000 must be brought in the United States Court of Federal Claims (hereinafter Claims Court).¹⁵⁹The effect of this is to limit the number of courts that see cases of a certain type, and to make decisions of the Claims Court and the Court of Appeals for the Federal Circuit essentially the doctrinal authority on certain issues. The just compensation claim in *Yancey* is an example of a suit brought under the Tucker Act first in the Claims Court and then in the Federal Circuit on appeal. It may be apparent from the discussion of that case, however, that the general rule just stated has exceptions, for *Empire* was in fact a case from a different circuit addressing the same issue as that in *Yancey*. The explanation lies in procedural missteps, as Circuit Judge Sloviter explains in his *Empire* concurrence:

[T]he procedure followed in the district court by the plaintiff and by the federal defendants unnecessarily muddled the procedural posture of this case.... [T]he claim against the federal officials in their official capacities [as opposed to in their individual capacities, which is not covered under the Act] was one for money damages in excess of \$10,000 and, therefore, properly should have been brought in Claims Court.¹⁶⁰

Although in this instance the Third Circuit determined that it had jurisdiction because the district court had not purported to pass on any Tucker Act claim,¹⁶¹the Claims Court tends to have jurisdiction in these types of matters.

The other basis for suit, the Federal Tort Claims Act (FTCA), does not rely on the constitutional grounds

¹⁵⁸28 U.S.C. § 1491(a)(1) reads in part: “The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”

¹⁵⁹*Cf.* 28 U.S.C. § 1346(a), “The Little Tucker Act,” granting jurisdiction to the district courts in such matters where the amount in dispute is less than \$10,000. On the other hand, the Claims Court may hear such cases regardless of the amount in dispute. *See* *Wesreco, Inc. v. U.S. Dept. of Interior*, 618 F.Supp. 562, 568 (D. Utah 1985).

¹⁶¹*Id.* at 917.

discussed thus far. The FTCA allows an individual to sue the government in certain instances as though it were a regular tortfeasor. An agency that seizes and damages (or lets rot) an owner's goods might fit that description. Unfortunately, the Act contains a provision that can severely limit a claimant's chances. 28 U.S.C. § 2465 explicitly limits the rights of a claimant where the government has reasonable cause for seizing her property.¹⁶² There is also a question whether the government is immune from liability under the discretionary function exception to the FTCA,¹⁶³ which excuses government agents whose actions involve a measure of discretion,¹⁶⁴ or the detention exception,¹⁶⁵ which protects agents involved in the detention of goods.¹⁶⁶ To better understand these statutes, it is useful to look at an example. One case that illustrates their usage is *Jarboe-Lackey Feedlots, Inc. v. United States*.¹⁶⁷ The United States filed an action under the

¹⁶²28 U.S.C. § 2465 reads in pertinent part:

(a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law –
 (1) such property shall be returned forthwith to the claimant or his agent; and
 (2) if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).
 (b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for–
 (A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;
 (B) post-judgment interest, as set forth in section 1961 of this title; . . .
 . . .
 (2)(D) If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.

¹⁶³28 U.S.C. § 2680(a). Section 2680 relates to the FTCA and the Little Tucker Act.

¹⁶⁴*See, e.g.,* Bub Davis Packing Co., Inc. v. United States, 443 F.Supp. 589 (W.D. Texas 1977) (holding that Department of Agriculture's investigation of plaintiff's factory was a discretionary function under the Act). *But see* Sandrini Brothers v. Voss, 9 Cal.Rptr.2d 763 (Cal. Ct. App. 1992) (holding that seizure action by state agency of allegedly adulterated grapes was ministerial rather than discretionary).

¹⁶⁵28 U.S.C. § 2680(c). Section 2680 relates to the FTCA and the Little Tucker Act.

¹⁶⁶*See, e.g.,* Formula One Motors, Ltd. v. U.S., 777 F.2d 822, 823 (2d Cir. 1985) (denying damages where claimants car was destroyed by DEA conducting drug search). The Second Circuit noted that there is some disagreement as to whether § 2680(c) applies to all seizures or merely those involving the collection of taxes or custom duties. Nevertheless, it held that in this case the exception would apply. *See also* S. Schonfeld Company, Inc. v. SS Akra Tenaron, 363 F.Supp. 1220 (D. South Carolina 1973). In that case, the claimant sued the government for negligently handling its cargo during a lawful detention. The government defended its actions under both § 2680(a) and (c). The court held that the discretionary exception did not apply because the damage had been done after the agent had exercised his discretion, but that the detention exception did work to immunize the government.

¹⁶⁷7 Cl. Ct. 329 (1985).

Federal Meat Inspection Act to seize 273 of the plaintiff's steers, which it believed to be illegally implanted with diethylstilbestrol (DES).¹⁶⁸ Although there was evidence that the claimant had been doping its livestock, the district court ultimately determined that the government had failed to make out its case against the claimant.¹⁶⁹ It directed that the government return the beef and pay costs, including storage, and noted that because the beef lost value due to the government's action, the plaintiff could bring a claim "either under the provisions of the Federal Tort Claim Act [sic] or perhaps within the framework of this litigation."¹⁷⁰ The Tenth Circuit, reviewing Jarboe-Lackey's claim under the FTCA, determined that the government had not consented to waive its immunity for this type of case under the Act, but that a Tucker Act claim might still be available.¹⁷¹ Jarboe-Lackey then sued as required in the Claims Court, pursuing the Tucker Act remedy as well as other possible remedies.

The Claims Court first addressed Jarboe-Lackey's FTCA claim. The plaintiff argued that the seizure was wrongful and therefore in dereliction of 28 U.S.C. § 2465, which limits damages for *reasonable* government seizures.¹⁷² The plaintiff proceeded on the grounds that no certificate of reasonableness had been issued by

¹⁶⁸ *Id.* at 331-2.

¹⁶⁹ *United States v. 2,116 Boxes of Boned Beef Weighing Approximately 154,121 Pounds*, 516 F.Supp 321, 342 (D. Kansas 1981).

¹⁷⁰ *Id.* at 351.

¹⁷¹ *U.S. v. 2,116 Boxes of Boned Beef, Weighing Approximately 154,121 Pounds*, 726 F.2d 1481, 1490-91 (10th Cir. 1984).

¹⁷² This is a slightly different ground than that relied upon by the Tenth Circuit, which cited the detention exception, 28 U.S.C. § 2680(c). A good comparison case under the FD&C Act is *United States v. 1500 Cases, More or Less*, 249 F.2d 382 (7th Cir. 1957). In that case, the Campbell Soup Company rejected the Smith Canning Company's tomatoes after learning that the FDA was investigating the goods for adulteration. Smith had to reroute and store the tomatoes in response, and, after it was determined by the Seventh Circuit that one batch was adulterated and one was not, the company sued for damages for its pre-seizure costs. Smith claimed that the FTCA was applicable because the FDA's seizure was wrongful. The court held that the claims were barred by both § 2680(c) and § 2465. It did not fully distinguish between these two sections beyond explaining that as to § 2465, there was evidence that the seizure was reasonable. The impression one gets from the case is that the seizure was reasonable, so that the government was immune under § 2465, but that even if it the seizure had not been reasonable, the government would still have been immune under § 2680(c). This paradoxical result suggests to me that § 2680(c) was applied

the district court as required by the statute and that therefore the seizure was in fact wrongful under that section; the court rejected this argument by pointing out that even if no certificate issued, the district court had otherwise found that the government had behaved reasonably in pursuing the seizure.¹⁷³ Hence, the lack of a certificate would not be determinative.¹⁷⁴ Nevertheless, there is some authority that 28 U.S.C. § 2465 would not preclude recovery in a suit for compensation. In *U.S. v. One 1965 Chevrolet Impala Convertible*,¹⁷⁵ the Internal Revenue Service seized two cars for forfeiture, but the judgment of forfeiture was eventually vacated. The claimants sued for recovery of the amount lost from depreciation during the detention. The Sixth Circuit sustained the award apparently relying on a takings argument, but it held that even though the government had acted reasonably, § 2465 would not bar recovery as it deemed the “costs” delineated in the statute were merely “court costs and costs incident to the seizure,” but not the “value of the property itself at the time it was seized.”¹⁷⁶ The court in *Jarboe-Lackey* appears to support this definition of costs, but it interprets § 2465 as a positive grant of rights rather than an obstacle to recovery. The Sixth Circuit’s rationale requires another source of rights (e.g., the Fifth Amendment) in order to recover damages, but in their estimation, § 2465 will not be a bar to that award. The Claims Court, conversely, allows one to recover under § 2465 itself, but only if the government did not act reasonably and then only court costs

improperly by the Seventh Circuit in this case, as well as by the Tenth Circuit in *2,116 Boxes of Boned Beef* and the Second Circuit in *Formula One Motors, Ltd. v. U.S.*, 777 F.2d 822 (2d Cir. 1985) (*supra* note 166). It is a canon of construction to give the statutes independent meaning; as such, the suggestion by the Second Circuit in *Formula One* that § 2680(c) applies only to detentions for the purpose of collecting taxes or customs duties seems to be the more logical approach. Nevertheless, this does not appear to be the general consensus. *Cf. S. Schonfeld Company, Inc. v. SS Akra Tenaron*, 363 F.Supp. 1220, 1222-25 (D. South Carolina 1973) (finding that the expansive reading of § 2680 is the general rule).

¹⁷³This determination had been made in relation to a determination under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (Supp.1983), regarding attorney’s fees. The district court denied fees under the EAJA on the basis that the seizure was “substantially justified.” 726 F.2d at 1483 (describing district court proceeding).

¹⁷⁴*See also*, 1500 Cases, More or Less, 249 F.2d 382, 384 (7th Cir. 1957).

¹⁷⁵475 F.2d 882 (6th Cir. 1973).

¹⁷⁶*Id.* at 886 n.3.

and costs incident to seizure (i.e., not the “diminished value of the *res*”¹⁷⁷).¹⁷⁸ Since the *Jarboe-Lackey* court viewed 28 U.S.C. § 2465 as a positive grant of rights, the failure of the plaintiff to prevail under that section did not prevent them from pursuing other theories of recovery. The Claims Court next addressed the takings claim. As noted, the United States has consented to be sued on constitutional grounds under the Tucker Act. The court recognized the importance of the right to compensation, and cited several cases supporting that right.¹⁷⁹ Nevertheless, after a quick review of the police power, it dispensed with the Fifth Amendment claim:

The seizure power with respect to meat that may be adulterated is intended to prevent a harm – a health hazard – to the public. Thus, the seizure and detention of plaintiff’s beef until released by the court presiding over the condemnation action is not actionable as a taking.¹⁸⁰

The court did not do an extended analysis of the equities in this case, but rather deferred easily to public interest considerations. Perhaps the court was motivated by some of the same factors that led the court in *Emery* to deny the criminally accused any compensation after his plea bargain; after all, despite the finding by the district court, the *Jarboe-Lackey* court referred constantly to the fact that the meat in question was “unlawfully implanted with a prohibited drug.”¹⁸¹ The court also ruled on the plaintiff’s claim that it was entitled to recover under an implied-in-fact contract theory; that is, that “a contract implied in fact arose from the seizure whereby defendant agreed to return plaintiff’s beef at its sale value.”¹⁸² Such a claim would

¹⁷⁷*Jarboe-Lackey Feedlots, Inc. v. United States*, 7 Cl. Ct. 329, 336-37 (1985).

¹⁷⁸See also *U.S. v. One (1) 1979 Cadillac Coupe De Ville VIN 6D4799266999*, 833 F.2d 994, 999 (Fed. Cir. 1987) (disagreeing with the Sixth Circuit’s decision in *One 1965 Chevrolet Impala Convertible* on the grounds that “the court dealt with section 2465 only in passing, and the government’s argument was that the section prohibited the award of damages rather than, as here, that it does not authorize the award”).

¹⁷⁹*Jarboe-Lackey*, 7 Cl. Ct. at 338. *E.g.*, *North American Cold Storage Company v. City of Chicago*, 211 U.S. 306, 29 S.Ct. 101 (1908), *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434 (1949).

¹⁸¹*Jarboe-Lackey*, 7 Cl. Ct. at 339. See also *id.* at 340 (“...it is not reasonable to anticipate that beef bearing illegal implants will not be detained long enough to try and decide a condemnation action.”).

¹⁸²*Id.*

also presumably be brought under the Tucker Act. The court rejected this theory based on the propositions that the plaintiff could have no expectation its goods would be returned, and that no agent had the authority to bind the government to pay for the lost value of the property.¹⁸³ Although the government was not acting under the FD&C Act in this particular instance, the facts in *Jarboe-Lackey* allow one to predict what might happen in a typical takings case brought against the government for unlawful seizure by the FDA. This is especially true given the Tucker Act's strictures that such a claim, if for more than \$10,000, must be brought in the Claims Court, the court that adjudicated Jarboe-Lackey's takings claim. *Jarboe-Lackey* may not bind a court, and perhaps better facts would sway a judge to consider the equities on the claimant's side more fully; nevertheless, the outlook is bleak for a property owner pursuing compensation in federal court.

E. Proceedings under State Law

An owner may have better luck under state law. One clear example that emerges in the case law is *Sandrini Brothers v. Voss*.¹⁸⁴ In that case, grapes were seized under state law¹⁸⁵ as having been treated with an "economic poison." Despite some differences between the FD&C Act and California food statute,¹⁸⁶ they are similar; the latter protects the public from any "hazard to human health or the environment"¹⁸⁷ and from owners attempting to secure an "unfair business advantage,"¹⁸⁸ and therefore can be generally analogized to the for-

¹⁸³*Id.* at 340.

¹⁸⁴9 Cal.Rptr.2d 763 (Cal. Ct. App. 1992).

¹⁸⁵Cal. Food and Agriculture Code § 12648.

¹⁸⁶The California provision allows articles that have been sprayed with an unregistered pesticide to be declared by the Director of the Department of Food and Agriculture as a "public nuisance" and seized. Cal. Food and Agriculture Code § 12648.

¹⁸⁷Cal. Food and Agriculture Code § 12648(b)(1).

¹⁸⁸Cal. Food and Agriculture Code § 12648(b)(2).

mer with its provisions on adulteration and misbranding.¹⁸⁹ *Without reaching a decision on the validity of the condemnation action, the trial court*

Sandrini held the relevant California provision unconstitutional on its face as a violation of the state constitution's due process clause.¹⁹⁰ The court determined, based on its reading of two California cases, *Menefee & Son v. Department of Food and Agriculture*¹⁹¹ and *Skelly v. State Personnel Bd.*,¹⁹² that certain procedural mechanisms were necessary to provide due process, including notice, hearing, and (where applicable) *compensation*. *Skelly* involved the process due to an employee before being terminated from his job.¹⁹³ *Menefee* held unconstitutional, based on its lack of the previously described procedural mechanisms (such as notice), the forerunner to the statute at issue in *Sandrini*.¹⁹⁴ The trial court in *Sandrini* had held that the statute needed specifically to provide a mechanism to compensate for wrongful seizures.¹⁹⁵ The appellate court took a narrower view, holding that the statute would not have to spell out the mechanism for compensation as long as one existed.¹⁹⁶ In other words, if there was a way for a complainant to procure compensation through other channels set up by the judicial system, there did not need to be a specific procedure authorized by the seizure statute. In this case, the court determined that the complainant had a method for recompense whether through a formal¹⁹⁷ or informal¹⁹⁸ hearing, and that the statute was therefore constitutional.

¹⁸⁹The statute was amended in response to the court's decision in *Menefee & Son v. Department of Food and Agriculture*, 245 Cal.Rptr. 166 (Cal. Ct. App. 1988) (holding predecessor version of Cal. Food and Agriculture Code § 12648 unconstitutional). The language cited herein, however, applies to both the current and the previous versions of the statute.

¹⁹⁰*Sandrini Brothers v. Voss*, 9 Cal.Rptr.2d 763, 764 (Cal. Ct. App. 1992).

¹⁹¹245 Cal.Rptr. 166 (Cal. Ct. App. 1988).

¹⁹²124 Cal.Rptr. 14, 539 P.2d 774 (Cal. 1975).

¹⁹³*Id.*

¹⁹⁴245 Cal.Rptr. at 168.

¹⁹⁵*Sandrini*, 9 Cal.Rptr.2d at 766.

¹⁹⁶*Id.* at 767.

¹⁹⁷"[R]eview by a court in a mandamus proceeding pursuant to [Cal.] Code of Civil Procedure section 1094.5 (§ 12648, subd. (d))." *Id.*

¹⁹⁸"[A]n administrative hearing before the director (§ 12648, subd. (c)). . . ." *Id.*

The principal expounded in this case is key: that there must be some means by which a wrongfully deprived owner can be compensated for her loss.¹⁹⁹ This is a far cry from a case such as *Jarboe-Lackey*, wherein the court could nonchalantly point to the state's police powers as a safeguard to governmental action. Relying on the California constitution's due process clause,²⁰⁰ rather than its just compensation clause,²⁰¹ the court came to a very different conclusion than the *Jarboe-Lackey* court, relying on federal provisions. The *Sandrini* court did not really explain why it believed compensation to be necessary, only that it *was* required by due process. In some ways, this does a disservice to those who would use the case as precedent. Unlike the court in *Jarboe-Lackey*, which at least acknowledged (before denying the claim) the harm inherent to a seizure action, the court here failed to articulate good reasons for its rule. Other owners who would use *Sandrini* to buttress their contention that compensation is required by law or *fairness* have a good case to use, but not much in the way of language.

On the other hand, the ruling is important in that the court was concerned that a mechanism for compensation exist generally. It did not first determine the merits of the government's claim that the grapes were dangerous, but rather ruled that the *first* thing was to make sure compensation was at least available.

This is a strong push on the individual's side of the balance, and a positive reinforcement of the individual's

¹⁹⁹The *Sandrini* court suggests that, under California law, the government is not immune from liability where it functions in a ministerial as opposed to discretionary manner, and this is how it characterizes the decision of an agent who recommends seizure. *Id.* at 769.

²⁰⁰CA CONST Art. 1, § 7.

²⁰¹CA CONST Art. 1, § 19. The line between the federal or a state due process clause and just compensation clause is often blurred. For example, it has long been held that the Fourteenth Amendment's due process guarantees include the right to just compensation in the event of a taking. *See, e.g., Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 235-37, 17 S.Ct. 581, 584-85 (1897).

constitutional right – be it of due process or just compensation – over and above the claim of protection of the public welfare.

This is not to deny the importance of the public well-being; all states recognize the right of the government to seize property in exercise of its police power when such property may harm people. Some states adhere to legitimacy of the police power in circumstances where it seems to work to the *detriment* of the end consumer it is intended to protect. In *State v. 44 Gunny Sacks of Grain*,²⁰² the court held that it was not a compensable taking where the state seized adulterated grain from a consumer who had bought it unaware of the defect, and who had cooperated with the New Mexico Department of Health and Human Services when it contacted him regarding the problem. The court explained that the law that authorized the seizure was intended to protect the public, and that it did not specify the circumstances under which the commodity needed to be found, as the suit was not against the owner of the *res* but the *res* itself.²⁰³ The court easily dispensed with the takings argument: “Injury which results from the proper exercise of the police power is not compensable.”²⁰⁴ This may seem an odd result. Much of this paper has been devoted to asking whether the public interest in protection from *economic* harms is really as important as most courts imply. Here, a consumer *is harmed by his purchase* (due to the subsequent seizure of the adulterated product). The law protects his health, but harms his wallet. Although it is not indicated by the case, the consumer probably has tort law remedies against the seller. Still, if the government’s concern is in protecting the consumer from both physical and economic harms, a consistent result might dictate that he be compensated for the

²⁰²497 P.2d 966 (N.M. 1972).

²⁰³*Id.* at 967.

²⁰⁴*Id.*

deprivation.

F. Proposed Solutions to the Just Compensation Problem

It is unfair to reject a claimant's suit for recovery out of hand, based on notions of the police power. It places the burden too heavily on the wrongly accused, who must bear more than the loss of value to her property. On the question of incidental costs, consider the case of *United States v. 1500 Cases, More or Less*.²⁰⁵ Upon learning that the FDA was investigating the Smith Canning Company's canned tomatoes, the Campbell Soup Company rejected Smith's supply. The district court determined that Smith's tomatoes were not adulterated, but the Seventh Circuit reversed as to one of the two sets of cans, and rejected Smith's claim for pre-seizure costs incident to Campbell's rejection.²⁰⁶ Assume, however, that the district court's ruling (that the tomatoes were not adulterated) had stood. Smith not only lost Campbell's business that day, but it is possible that Campbell got an entirely new supplier in the meantime (assuming that Smith was a regular supplier). Moreover, Smith's reputation was tarnished. Campbell is a big name, and its actions were bound to have repercussions in the industry. Smith may have lost other business as a result. Its insurance may have gone up. Its attorneys may have decided to increase their fees. It may have had attorney's fees and pre-litigation costs that were not recoverable.²⁰⁷ Of course, this is speculation. But some or all of these

²⁰⁵249 F.2d 382 (7th Cir. 1957), discussed in detail *supra*, at note 172.

²⁰⁶The government did acknowledge its liability for storage costs during the detention. *Id.* at 383. The court indicates that there is no basis for other costs in this case, and refers to *United States v. French Sardine Co., Inc.*, 80 F.2d 325 (9th Cir. 1935), for the proposition that the FD&C Act "does not provide for allowance for costs to a claimant successful in opposing libels brought by the United States." *1500 Cases*, 249 F.2d at 384.

²⁰⁷See *U.S. v. 2,116 Boxes of Boned Beef, Weighing Approximately 154,121 Pounds*, 726 F.2d 1481, 1486-87 (10th Cir. 1984) (denying recovery for attorney's fees under EAJA). See also *Yancey v. United States*, 915 F.2d 1534, 1543 (1990) (discussing extra costs).

possibilities are not unlikely. When an aggrieved claimant sues for compensation, she is only suing for the actual decline in value of her property; a whole wealth of costs may never even be addressed. She is only asking for a slice of the pie.

As such, it seems that the courts should find another solution. In the context of seizures of evidence for criminal trials, Spencer M. Punnett II has proposed the following system:

Procedurally, the plaintiff's culpability in the underlying offense could be an affirmative defense for the government. The burden would be on the state to show, by a preponderance of the evidence, that the plaintiff had committed a wrongful act substantially related to the subject of the investigation that caused the damage. ¶This showing of culpability would be independent of any criminal trial. Under some circumstances, the burden of establishing the plaintiff's culpability under the lower 'preponderance' standard could mean a finding of no duty to compensate, even when the plaintiff was not convicted of any offense. Likewise, the plaintiff might succeed with the 'takings' action even though he had been convicted criminally.²⁰⁸

Punnett's suggestion works well in the criminal context because of two factors: first, the burden of proof in criminal trials is different than in his proposed hearings, hence those who seem to be involved in a crime but cannot be convicted beyond a reasonable doubt could still lose their property rights; second, innocent victims and bystanders who bear no culpability should win easily. Although the mechanism he proposes cannot be translated precisely to the food and drug context, the logic is important. Punnett essentially proposes a method to frame the issue. He suggests decision-makers *tilt the balance* toward the public interest or the private interest depending on who wins the underlying determination, but that it also consider all the relevant facts. In the case of *Jarboe-Lackey*, for example, the court's intuition that Jarboe-Lackey was not wholly innocent would be an important consideration. The *Sandrini* court's sense that Sandrini was not really at fault is also important. A blanket rule that awarded damages in all cases in which the basis for the

seizure was invalidated would recognize the latter intuition but not the former. The *Jarboe-Lackey* rule has the opposite infirmity.

A possible remedy may be to have an administrative finding on the issue, to be reviewable by the court. This would preserve judicial resources and force the agencies to act carefully to avoid taxing theirs. Of course, this would essentially emphasize the discretionary nature of such a determination, but the necessity of discretion is at the heart of the issue. Such a solution would also require a quibble on the constitutional question of what constitutes a taking, or else it would need to bypass the question altogether by providing a statutory means for recovery where such recovery would be reasonable under the circumstances. Other solutions are possible. The important thing is to recognize the often disregarded but very real interests on the side of the claimant.

As a side note, the *Yancey* court explains that the appropriate determination for damages is Fair Market Value at the time of the taking (minus, one presumes, the value at the time of recovery if there is any).²⁰⁹ Lost profits are generally not recoverable.²¹⁰ Although this might hurt a company like Smith, as described, it is an easier calculation, and appropriate in this context.

²⁰⁹*Yancey v. United States*, 915 F.2d 1534, 1542-43 (1990).

²¹⁰*Id.* at 1542.

IV. A Slight Diversion: The Fourth Amendment Although the thrust of this paper has been to analyze the relationship between FDA seizures and the Fifth Amendment, it is helpful to examine briefly the impact of the Fourth Amendment in this context. The Fourth Amendment, because it relates to whether and how goods may be seized, is closely tied to the concerns already noted in this paper, particularly in regard to due process.

The Fourth Amendment, although traditionally seen in the criminal procedure context, applies to civil proceedings as well.²¹¹ As noted by Judge Skelly-Wright of the D.C. Circuit, the requirement of a libel of information is intended to ensure that FDA action is reasonable. In *Founding Church of Scientology of Washington, D.C. v. United States*, he found that the libel filed by the government was fair, in that it “particularly described the items to be seized, and gave a reasonably particular account of the respects in which they were thought to contravene the Act.”²¹² The procedure just described, however, is not the same as a hearing with both parties present. The target of the libel does not have the opportunity to present her side, and, as discussed, she may not until after the seizure.

It is unclear the extent to which, moreover, a warrant must issue on probable cause. Judge Skelly-Wright’s opinion seems to indicate that the determination merely needs to ensure that the condemnation action

²¹¹Consider *Founding Church of Scientology of Washington, D.C. v. United States*, 409 F.2d 1146 (D.C. Cir. 1968). The court, per Skelly-Wright, said:

Though warrants are generally necessary for arrests of persons and for searches, the warrant requirement has not traditionally been imposed upon seizures of the type involved in this case – attachment of property in the course of civil proceedings. This does not mean that the Fourth Amendment does not apply to such seizures, in both its substantive prohibition against unreasonable seizures and its procedural requirement of judicial or quasi-judicial review of the decision to seize. It means merely that judicial restraint is imposed through a different form of proceeding that the showing of probable cause before a magistrate. In the case of ordinary civil attachments, the details of such proceedings are, even in the federal courts, left to state law. In cases in admiralty, the process is governed by the Admiralty Rules. . . .

Id. at 1150.

²¹²*Id.*

is reasonable.²¹³ Even then courts do not always require precision.²¹⁴ Justice Skelly-Wright's formulation is strengthened by the fact that most FDA seizures do not invade the privacy of the home,²¹⁵ the preservation of which is at the heart of the Fourth Amendment.²¹⁶ Where a seizure may more drastically affect an individual's privacy, the protections of the Amendment will more likely be applicable.²¹⁷ On the other hand, public entities that are "closely regulated" industries generally receive less protection.²¹⁸ An illegal seizure, moreover, does not necessarily immunize the goods from forfeiture. The government can still condemn the property where sufficient independent (i.e., untainted) evidence exists.²¹⁹

To say that the system does not protect all owners in every case is not to imply that the discretion of FDA agents is unlimited. FDA agents may be constrained by internal FDA regulations and supervision. As noted

²¹³*Id.* Cf. *United States v. Articles of Hazardous Substance*, 588 F.2d 39, 42-43 (4th Cir. 1978) (citing with approval Judge Skelly-Wright's analysis in upholding seizure under Federal Hazardous Substances Act, but indicating that government's actions indicated probable cause even if warrant was issued by clerk, rather than by an independent judicial officer establishing probable cause). See also *United States v. Articles of Drug.. Wans*, 526 F.Supp. 703, 706 (D. Puerto Rico 1981) (compliance with the requirements of Rule(C) of the Supplemental Rules for Certain Admiralty and Maritime Claims [i.e., filing a libel with the Clerk of the Court rather than a judicial officer] is sufficient for Fourth Amendment purposes).

²¹⁴See, *U.S. v. 780 Cases, More or Less, of Latex Surgeons' Gloves, an Article of Device*, 799 F.Supp. 1275, 1298 (D. Puerto Rico 1992) ("Seizures brought under the Act are initiated in conformity with the rules of admiralty. 21 U.S.C. § 334(b); Fed.R.Civ.P., Rules for Certain Admiralty and Maritime Claims, Rule C(2) and (3). Rule C(2) requires only that a complaint describe with "reasonable particularity" the property that is the subject of the action. On its face, this rule contemplates a less than exact identification of the articles to be seized. . . . Hence, the rule does not anticipate an exact description of each item to be seized.").

²¹⁵See, *e.g.*, *Articles of Hazardous Substance*, 588 F.2d at 39.

²¹⁶See, *e.g.*, *Kyllo v. U.S.*, 533 U.S. 27, 37-38, 40, 121 S.Ct. 2038, 2045, 2046 (emphasizing the "sanctity of the home" in holding unconstitutional police's use of thermal imaging technology to determine whether an individual was growing marijuana in his house).

²¹⁷*U. S. v. Device More or Less Labeled Theramatic*, 641 F.2d 1289, 1291 (9th Cir. 1981) (seizure of device from neurosurgeon's office violated Fourth Amendment; seizure in home or office requires greater procedural protection), *appeal after remand*, *U.S. v. An Article of Device Theramatic*, 715 F.2d 1339 (9th Cir. 1983), *cert. denied sub nom.*, *Cloward v. U.S.*, 465 U.S. 1025, 104 S.Ct. 1281 (1984).

²¹⁸See, *e.g.*, *United States v. Argent Chemical Laboratories*, 93 F.3d 572, 575-77 (9th Cir. 1996) (upholding seizure of allegedly adulterated veterinary drugs under the so-called *Colonnade-Biswell* exception, which allows "warrantless searches and seizures on commercial property used in 'closely regulated' industries").

²¹⁹*U.S. v. An Article of Device Theramatic*, 715 F.2d 1339 (9th Cir. 1983).

by the court in *United States v. Argent Chemical Laboratories, Inc.*,

[I]n most cases, the seizure is subject to the approval of one of the Food and Drug Administration's district offices, the appropriate office (or "center") in the Food and Drug Administration headquarters, the Food and Drug Administration's Office of Enforcement, the Office of the Chief Counsel, and the Department of Justice.²²⁰

Given the narrow window of protection afforded by the courts under the Fourth Amendment, especially in light of the due process decisions on notice and hearing, agency discretion is still an owner's best friend. The apparent ease with which the FDA can act against a potentially unlawful producer is reassuring to the consumer, but for the producer, it is so only to the extent that she has faith in administrative authority.

V. Conclusion

The system may be described as bent but not broken. The seizure power is not wielded constantly, although it may dangle over the heads of some owners like the sword of Damocles. Although the system functions adequately, it could be made to work better. The issuing of warrants on less than probable cause, coupled with post-seizure hearings and a limited right of recompense, although all small potatoes in their own right, together can amount to a genuine burden on the affected property owner. Seizure is a weapon: "Some litigators believe that if there is an advantage to be taken, it should be taken. Whatever the propriety of that view in ordinary civil litigation between private parties, it is to be hoped that governmental agencies such as the FDA would take a different approach."²²¹ It would not tax FDA or judicial resources too greatly to consider the rights of the wrongly accused owner, or the potentially wrongly accused, a little more carefully.

²²¹Buc, *supra* note 20, at 152 (arguing for use of injunctions instead of seizures).